A. Pick-up and delivery and road service together would be about 75 miles.

Q. What is the longest haul you are performing?

A. One hundred and eighty some odd miles, roughly; close to 190 miles.

Q. What is the longest trip you presently are using owner-operators on, on a leased basis?

A. It could not be over 180, and the average is about 100 miles.

Q. You testified you were using them on a round trip basis.

A. It is easier for us to do it that way.

Q. You are so doing?

A. On a roundtrip basis.

Q. And I take it you pay them on the conclusion of each trip?

A. Some are with us for as much as two weeks—longer than one trip. It more or less depends on their economic situation. Some want to be paid pretty quick and others want to be paid every week.

[fol. 2742] Q. Do you know enough about the owner-operators you employ to know what their overhead cost is compared to your company's overhead in determining their total costs of operation?

A. My company has an overhead cost. I haven't——

Q. Have they an overhead cost that compares at all with your company?

A. You mean higher or lower?

Q. Any.

A. If they have an overhead cost I don't know what it would be. What they would call overhead I suppose I would call operating expense.

Q. Isn't it more logical to presume from the fact that these men are working to make money, and they refuse to become drivers—isn't it reasonable to presume that the difference between your cost and their cost is your overhead and not their low wages?

If someone testified they couldn't get the owner-operators to go with them on a regular basis because the owner-operators could make more money with their own operations——

A. I know more owner-operators that don't make money than that do, and I know they claim to be victims of circumstances beyond their control.

Q. The ones working for you, Mr. Markowitz, are they not making money, in your opinion?

A. That depends.

[fol. 2743] Q. How many do you employ?

A. We may have half a dozen on at a time, and sometimes only two.

Q. You say you have some for as much as a week or two at a time?

A. Yes.

Q. Are those people making money, or not, when they work for you?

A. To listen to them they are not, but they want to work there. They still have to eat.

Q. That suits me fine.

Exam. Lawton: Do you have any owner-operators that have been with you for a long period of time, hauling for your company?

The Witness: Yes; one owner-operator has four tractors and six trailers and we give him preference whenever he is available.

Exam. Lawton: How long has he been working for you?

A. During the war he was with us from six to eight months at a stretch.

Exam. Lawton: I mean dating back how far?

The Witness: Five years or more.

Exam. Lawton: Have you observed any other owner-operators who haul for you who in fact have gone out of business and are no longer available when you want them?

[fol. 2744] A. Yes. We keep a list and every once in a while we have to strike someone.

Exam. Lawton: You have observed financial casualties?

The Witness: Quite a few.

By Mr. Diehl:

Q. When you trike those people off the list do you know why they are off the list?

A. They usually drop in and tell us they are out of business, and cannot be called any more.

Q. Do they tell you why they are out of business?

A. Most of them couldn't make money or their brother-in-law got them jobs in a factory and they sell their trailer and tractor to the other fellow who comes in.

Q. That is the way you get your men to do your hauling?

A. We give preference to the ones we know are dependable. This particular one man——

Q. He owns four tractors and six trailers?

A. He doesn't work for us exclusively.

Q. But he does work for you?

A. Yes.

Q. And you know he owns four tractors and six trailers?

A. Yes.

Q. Is he a responsible business man, or not?

A. He does our bidding. He carries out his instructions and does the job.

Q. Do you know if he inherited this equipment?

[fol. 2745] A. I don't know.

Q. Do you know how he got started in the business?

A. He was a coal junky going to the Pennsylvania mines for a load of coal.

Q. And he is now owner of sufficient equipment to meet your usual needs for augmenting your fleet; is that right?

A. He can meet most of our needs.

Q. He is not one of the casualties financially you are talking about?

A. Not yet.

Q. And he is not working for so little in the way of wages that he isn't getting enough to eat?

A. He gets enough to eat.

By Mr. McAuliffe:

Q. Mr. Markowitz, are you testifying for New York & New Brunswick Motor Express alone?

A. Alone.

Q. Are you interested in any other interstate motor carrier?

A. I just work for this one.

Q. And it is in the interest of your employer that you are presenting this testimony in this case?

A. He knows all about it.

Q. That is why you are here?

A. That isn't my whole purpose. I want to see conditions in the industry stabilized.

Q. Now, do you know any owner-operators who have any traffic managers or vice-presidents connected with [fol. 2746] your organization?

A. I don't know of any.

Q. They are items of expense that your carrier organizations ordinarily have, are they not?

A. Necessary expense.

Q. You indicated in your Exhibit 31 that you feel that division of the revenue with an owner-operator is unlawful.

A. That is right.

Q. Do you consider that owner-operator would have legitimate expenses to be paid in connection with hauling freight for an authorized carrier?

A. He would have.

Q. Do you think the authorized carrier has legitimate expenses which should be paid in connection with handling the freight hauled by the owner-operator?

A. Yes.

Q. Why do you feel a division of revenue is unlawful?

A. Because the proper method should be the costs of the owner-operator plus a fair profit to him in doing what he does, and when that happens I don't think there will be much owner-operator work.

Q. You feel that the owner-operators' costs are higher than yours?

A. As to the extent of his labor. He knows his costs of gas and what oil costs and the notes on his truck, and he knows the tires will blow, but he doesn't seem to know [fol. 2747] that he is a human being and he should have something, too.

Q. How long has this owner-operator with four tractors and six trailers been with your company?

A. About five years or more.

Q. Do you know how many pieces of equipment he had five years ago?

A. I can't be sure of that; I don't know.

Q. Have you any idea at all?

A. I think he has more than he had then. That is not a big operation, anyway.

Q. Just answer my question. I want to know if he had four tractors and six trailers five years ago?

A. I think he had less.

Q. And he has been an owner-operator for the last five years?

A. That is one of his businesses, yes.

Q. Has he any authorized trucking rights?

A. Yes, he has.

Q. Let us assume something which you probably will not concede: That an owner-operator's costs are lower than your costs on owned vehicles.

A. All right.

Q. Do you see any reason why the shipping public should be deprived of the benefits of the lower costs of these owner-operator operations?

[fol. 2748] A. Under proper regulations we will adopt those methods for ourselves, but we want to know they are proper and then we will adopt them, too.

Q. Isn't it a fact, Mr. Markowitz, that there are operations under certificates and permits of two or three trucks which are conducted at much lower costs per truck than the larger operations, and much higher profits?

A. Are you speaking of authorized carriers?

Q. Yes.

A. And not involving owner-operators? There are certainly lower costs for certain of the operators than for us.

Q. You haven't answered me yet. You say there are smaller operations at lower costs than the larger operations?

A. I do know that there are.

Q. Why do you feel the owner-operators don't have the same advantages on some occasions?

A. I think there are exceptions. I know of certain owner-operators who are customarily employed by certain companies and treated well. They like their jobs and make money. What else they do that is unlawful I cannot tell you.

Q. If I should come into your territory and buy a certificate and decide to use owner-operators exclusively, and

can operate at a lower cost than you can with your own vehicles, you would consider it an improper practice on my part?

A. It is improper unless it is regulated and it is open to me and I can use them, too. If you translate it into the [fol. 2749] charges you make the shipper and produce a so-called lower cost, that is improper.

Q. You said "so-called lower cost." If I have actually lower costs, and the owner-operators have lower costs——

A. If after you have complied with everything I have suggested you still have lower costs, I am wrong and you are right.

Q. If I may suggest, I feel your suggestions are not within the law.

Mr. Burton Wheeler: You are not asking him; you are telling him.

Exam. Lawton: Proceed with the cross-examination.

Mr. McAuliffe: I am asking him to assume certain facts, and I think that is correct cross-examination.

Exam. Lawton: Proceed.

By Mr. McAuliffe:

Q. I ask you, sir, if any person with a certificate can operate profitably in complying with all of the present regulations of the Interstate Commerce Commission through the use of owner-operators, and compete with your own company using its own equipment, do you see anything improper about that?

A. You are talking about present regulations, and there are none. When the regulations are imposed on you and me, and you turn out to be a lower-cost operator than I, then you are smart and I am dumb, and I have to find the answer.

[fol. 2750] But I know that the costs are lower because of lack of regulations. When we get them they won't be any lower.

Q. Do I understand the regulation, of which there is a lack, is a regulation to make an owner-operator charge his full costs?

A. If your question is this—I think he should charge his full cost.

Q. I am asking you what regulation of owner-operators by the Commission will result in higher costs for owner-operators comparable to those of the carriers who own their own equipment?

A. These regulations. They will equalize what we have to do with what the owner-operator has to do because they will have to do them, too.

Q. Do you know of any other regulations, except those you propose, which will increase the costs of owner-operators so their total costs will be comparable to yours?

A. I am not out to increase the costs of owner-operators. I want to impose on them the same regulations imposed on us. All I want is equal treatment. If the owner-operator is still the better system I will personally see that we adopt it.

Q. You are not advocating additional legislation by the Congress here?

A. Not here, but I expect to go into that, too. I think there could be some more legislation on the subject. I think either the Commission ought to suggest it to Congress in its annual report soon, especially after this investigation.

[fol. 2751] A. When speaking of your suggestions, sir, I ask you to refer to the last item on Exhibit 31, sheet 6. You say that the witness approves the final proposal of the American Trucking Association's Leasing Committee except to the extent indicated in this exhibit.

Isn't it true that in any number of essential respects your exhibit is entirely different from the American Trucking Association's Leasing Committee's report?

A. I don't disagree with the principles of that report. Their report is weak and ineffective and useless. It says what ought to be done and doesn't say how to do it.

I would like to see the A.T.A. leasing report made effective. When it is made effective I am for it. When not effective I am against it.

Q. And you have concluded your method is the only way it can be done?

A. It is just my contribution.

Q. But the A.T.A. has not shown that it could make it effective. Is that your point?

A. It has not.

Q. Right.

Your Exhibit 32, Motor Vehicle Trip Lease, is that only for use between authorized carriers and owner-operators?

A. I would like to see such a provision. I say any trip lease authorized after this investigation should be subject to the use of this form. If that is unlawful and im-
[fol. 2752] proper and discarded by the Commission it won't be used. If it is proper, and it is allowed—

Q. You mean if the Commission does not prohibit trip leasing altogether you want Exhibit 32 used?

A. That is correct.

Q. And you have made no suggestions as to interchange of equipment and lease of vehicles by authorized carriers other than this trip lease?

A. On that particular angle I agree whole-heartedly with A.T.A. There isn't any real problem of interchanging equipment between carriers with one single exception, and it is in subject 10, on sheet 5, of Exhibit 31. It contains the only abuses I have observed in connection with that type of leasing arrangement. That is a so-called bypass allowance or lease of operating authority without going to the Commission for approval, and it is done by an operator calling you and saying, "I have a load for a place I can't cover. Will you loan me the use of your rights to go there and I will pay you 10 percent, and then you look the other way."

Q. Aside from that, do I understand you advocate free interchange of equipment between—

A. Trailer equipment absolutely free interchange; motive power, subject to restriction. Motive power is what creates the abuse.

Q. This has nothing to do with shippers?

[fol. 2753] A. Not all. I did, however, in my Exhibit 31 suggest in Subject 4 that those agreements must be submitted to the Commission and approved in advance of their performance.

Q. We will get around to that.

Exam. Lawton: We will take a five-minute recess.

(Short recess.)

Exam. Lawton: Come to order, please.

By Mr. McAuliffe:

Q. Mr. Markowitz, there has been some testimony about so-called gypsying, serving shippers directly with no semblance of operating authority. Are you familiar with any situations like that?

A. That is not true. Carriers are leasing trucks to shippers. I don't know of any gypsies leasing to shippers in this territory. There are some in Virginia and North Carolina, in certain portions.

Q. How did you observe that?

A. I saw them on the roads, on Route 1, for instance, with trailers marked "Owned by John Smith," some town in Virginia, and dragging a trailer on which some furniture company's name was painted.

Q. How did you know he was operating without authority?

A. I am sorry I misunderstood you. I thought you asked if I knew of any gypsy operating for a shipper.

Q. That is right.

A. Whether he operates without authority, I don't know.

[fol. 2754] Q. How do you know they are gypsies?

A. It says "Owned by John Smith," and operated by another fellow. He would be a gypsy.

Q. They may be operating for an authorized carrier.

A. With the shipper's name on the vehicle, you mean?

Q. Yes.

A. I can't see how that is possible. If it says "Owned by John Smith," and is operated for a particular shipper who is named, I don't see where an authorized carrier is involved.

Q. Is it your purpose by these exhibits you put in to prohibit me from buying a tractor and leasing it to a shipper?

A. I don't think that is my purpose.

Q. How do you know if is not someone like me who owns the truck and leased it to the shipper?

A. I don't know. I think we should find out.

Q. You don't know of any gypsies who are operating for any shippers?

A. Only from what I saw.

Q. And you don't know if that was a full time employee or that shipper's driver?

A. I don't know.

Q. You mentioned observing a lot of violations of regulations on U. S. 1. What were they?

A. Here is a good one you see every day: A truck pulled by the side of the road without a name on the cab or trailer with the driver's feet without shoes on sticking out of the [fol. 2755] cab, sleeping in the cab.

Q. What does that violate?

A. My understanding of the regulations is that a driver is required after ten hours of continuous driving to be away from his vehicle and taking eight hours' rest in the proper atmosphere unless a sleeper cab is being operated with two men. I don't think the regulations include what I saw.

Q. How do you know how long the people with their feet sticking out of the cab have been operating the car?

A. When a man parks by the side of the road and takes his shoes off and goes to sleep I have an idea he is tired.

Q. If he has his shoes off and is sleeping you have an idea he is very tired?

A. I can drive more than 10 hours myself.

Q. Let's assume the man is driving his own car with his own freight on it.

A. He would be a private—

Q. Yes.

A. I am not too familiar with the operations—the regulations as applied to private carriers, but I understand they do.

Q. Have you any other specific violations that you have observed on U. S. 1?

A. Operating with lights out, no lights at all.

Q. What kind of equipment?

[fol. 2756] A. Ramshackle, and a tractor that looks like it is beat up for 16 years, and a trailer that might not finish the journey.

Q. That is a violation of State law, also?

A. In the State of New Jersey it is.

Q. Have you any other violations?

A. Yes, overloading. Using a light tractor to haul a load twice as heavy as the brakes could possibly stop.

Q. How much is loaded on a truck?

A. After one particular accident I observed 80,000 pounds of freight fell all over the road. We were called to pick it up.

Q. And you say it was 80,000?

A. When we weighed it it was 80,000 pounds.

Q. Do you know of any other examples of overloading?

A. I have seen accidents where the trucks are too heavily ladened to stop. The tractor was a light model and the load would call for a heavy model. We see it in the paper.

Q. You read in the paper that the load is too heavy?

A. In New Jersey there has been a complete attack because of that situation for more than two months, heavily ladened tractors. The newspapers are calling on the legislature to put an end to that situation.

Mr. Eldred: Was that attack taken by a leading newspaper in the State?

The Witness: For more than two months. The leading newspaper in the State is carrying the attack.

[fol. 2757] By Mr. McAuliffe:

Q. You state that State laws generally require identification of motor vehicles. Are you familiar with the requirements in all States?

A. I can't say I am. New Jersey has such a law.

Q. Do you know about the other 47 States?

A. Not all 47, but I have inquired--

Q. In what States did you inquire?

A. New York, New Jersey, and Pennsylvania.

Q. And they require that the owner and operator both be identified?

A. That is right.

Q. What does "commercial vehicle" mean in that sense? Would that include a private carrier?

A. A commercial vehicle is a vehicle used to transport freight rather than persons, and a special plate is issued.

Q. And do you know whether it includes private carriers in other States?

A. I don't know about all 47. Pennsylvania has a commercial vehicle law, and New York has.

Q. But you don't know generally what requirements apply to private carriers in other States?

A. I know about Maryland. They have one.

Q. That includes private trucks?

A. Yes, a commercial form of license with a higher fee.

Q. You also mentioned that you believe owner-operators ordinarily did not read the lease they execute with author-
[fol. 2758] ized carriers.

A. That is right.

Q. Do you think that they will read this lease that you propose here?

A. No, but they will always see the same type of lease and once they read one they can expect the next one to be the same. No, I can't possibly expect that.

Q. What good do you expect to draw from the owner-operators reading the lease or having a uniform lease?

A. If he reads it once, and it is uniform, it will become habitual with him to know what his responsibilities are, and the owners' responsibilities.

Generally now there is a dispute and generally the owner finds he is in the middle. That is where the operator put him.

Q. In addition to being worried about the authorized carriers' practices in hiring owner-operators, you are concerned about the well being of the owner-operator himself?

A. We are supposed to be. We are supposed to accept that responsibility. I read the law that way. It is our concern to see he does everything he is required to do, everything that is required of own drivers in every respect.

Q. I didn't ask about that. You said if he read the lease he would know what he was entitled to.

A. And also what we are entitled to.

[fol. 2759] Q. And you are more concerned with his responsibilities to you as a carrier than how well he makes out?

A. No, I wouldn't say that. I am concerned first with his responsibilities to me as a carrier. I would like to see him work out because I would like to see him work for us again if we need him.

Q. If you increase his costs do you expect him to be around again to work for you?

A. Whether I expect it or not, he is there.

Q. Didn't you testify that your longest haul is something less than 200 miles?

A. Yes.

Q. Do you know anything about the advantages or disadvantages of using owner-operators for substantially longer hauls?

A. We don't engage in anything like that. I have my own opinions.

Q. I want your firsthand operations.

A. I don't operate such a route.

Q. You don't know anything about it?

A. No.

Q. You mentioned a couple of cases in the State of New Jersey, one involving a lease of vehicles to a shipper. That is the first you mentioned.

A. Yes.

Q. And an authorized carrier leased that shipper a truck. [fol. 2760] A. First he formed a leasing company and then the leasing company leased the trucks.

Q. A leasing company controlled by an authorized carrier leased a truck to a shipper?

A. Yes.

Q. And you would prohibit that except for a period of 30 days?

A. I would prohibit it except in the cases where the proposed agreement was submitted to the Commission prior to being entered into, and it would be approved or disapproved.

Q. And I assume you would use the jurisdiction of the Commission over the authorized carrier as the source of that regulation?

A. Yes, if the law is sufficient now to do so. I believe I said in my Exhibit 31, Subject 5, that section 202 did have something.

Q. And in case section 202 did not give the Commission that jurisdiction you agree they could do nothing about it?

A. Except to recommend to Congress that additional legislation be enacted.

Q. Let us assume that either they have the power under 202, as you suggest, or Congress has given them that power over regulated carriers. Is there anything in the world to

prevent that particular group that rents trucks to shippers, that you have mentioned, with no connection with an authorized carrier, from leasing a truck to the shipper in that manner?

A. No, but he wouldn't dare cross the line so that he became subject to the law. The law would specify that. [fol. 2761] then.

Q. You say "he." Who do you mean?

A. The leasing company that is not a carrier or connected in any way with a carrier.

Q. Assume that he is not connected with a carrier, sir.

A. He would do it under those conditions.

Q. What conditions?

A. Under conditions not specified in the law, and he would be outside the scope of the law.

Q. You have agreed that if there is an amendment to the law it should relate to carriers regulated by the Interstate Commerce Commission and their activities, direct or indirect.

A. You have not asked if they should regulate the leasing companies. They should regulate the leasing companies.

Q. You want anybody who leases a truck to a shipper to be regulated?

A. Yes. I don't think the shippers would object to that.

Q. You are familiar with the fact that the Commission has found it has no jurisdiction over such straight leases of equipment?

A. I am afraid that is a little bit—it is not clear. The subject is a little hazy. It has not been decided that way. Nothing else has been decided, either. That is what is bad about it.

Q. Nothing else has been decided?

A. I don't think anybody knows.

[fol. 2762] Q. Are you familiar with Hertz Drive-It-Yourself?

A. In the State of Pennsylvania I know the Hertz Drive-It-Yourself.

Q. It is pretty near a national organization, isn't it?

A. Yes, it is.

Q. You feel that company should be regulated, too, to protect authorized carriers against leasing equipment?

A. Hertz does not abuse leasing of equipment. If it were one of the contributors to the abuses it would have to submit to regulation. Hertz is not a factor.

Q. Do I understand you want Congress to pass legislation which will regulate those leasing companies but to leave scott free the leasing companies that do not abuse the privilege?

A. If the Commission regulates leasing companies, neither Hertz nor any established companies would have any fault to find. I think they would welcome legislation to prevent abuses to others. They don't operate that way.

Q. Are you advocating legislation that would regulate Metropolitan and Hertz in the interest of authorized carriers by motor vehicles?

A. Not in the interest of authorized carriers; in the interest of sound national transportation policy. There would probably have to be another section that would set up regulations that would not hurt the two people you mention because I believe both are doing business in a proper straight-forward manner.

[fol. 2763] Q. You think they should be made subject to legislation so if they did step over the line the Commission or somebody else could go after them?

A. If that is in the public interest.

Q. Do you think it is?

A. I think it is—not because of anything that Hertz or Metropolitan—

Q. There are no abuses by those people?

A. But there are people in our industry who are abusing things. We are not abusing anything.

By Mr. Diehl:

Q. Are you in favor of repeal of part of the Act?

A. I am in favor of repeal or enforcement.

Q. Which do you think could be easier accomplished?

A. Repeal is not an answer to any problem. Enforcement is the answer.

By Mr. McAuliffe:

Q. You said you would favor repeal of the Motor Carrier Act, or enforcement of the Motor Carrier Act. I ask

you if the present provisions of the Motor Carrier Act were fully enforced would you be advocating all of the suggestions advanced in your suggestions here today?

A. Yes, they are an aid to enforcement.

Q. You stated you are not in favor of enforcement as it is today. In Subject 3 of Exhibit 31 you advocate a new section of the Bureau to be established to handle leasing and hauling.

[fol. 2764] A. Yes.

Q. Do you have reason to assume that such new bureau or agency would be able to enforce these matters better than they have been able to enforce other matters?

A. I would expect the Commission to go to Congress and say, "We need more money and more men so we can enforce it. If we don't get more money and more men there won't be any enforcement."

Q. So you have two proposals for additional legislation?

A. You need additional superintendence to make it work, not additional legislation.

Q. In Subject 7 of Exhibit 31 you have indicated that if anyone should violate your suggestion as to identification of leased vehicles—

A. Yes.

Q.—that the State policemen should pick them up and should make a report to the nearest district office of the Commission's Bureau of Motor Carriers.

A. That is right.

Q. Have you ever reported any violation to the nearest district office of the Bureau of Motor Carriers?

A. Yes, sir.

Q. Have you found a number of such violations reported to those district offices from time to time?

A. I am told that there are.

Q. Don't you feel that there would be a tremendous number of reported violations if your suggestions were fol-

[fol. 2765] lowed?

A. At the beginning and after a proper period of proper enforcement they would lessen.

Q. You have complained about past enforcement. What has been the result of your particular reports of violations to district offices?

A. I don't feel they got proper attention. I don't disrespect the Bureau. They may have good reasons for doing or not doing what they did not do.

Q. We all agree that those offices in the Commission have a great many problems, but what has been the actual result of your reports of violations? Have you ever had any of them removed?

A. One or two or three.

Q. Out of how many?

A. Out of 100.

Q. How many hundreds do you think you would report in the early days of these regulations you propose?

A. As many as were reported in the early days of the Act.

Q. How many?

A. Thousands.

Q. Would you expect better enforcement of this broad regulation from the Commission than you had in the past?

A. With more men and more money we would get better enforcement. It is up to the Commission to ask for that, and if they don't—

[fol. 2766] Q. That would add very materially to the enforcement problems of the Interstate Commerce Commission if it should follow your suggestions?

A. No, I believe it would aid them.

Q. Would it place additional enforcement duties on the Commission?

A. Yes, it would.

Q. Would it involve more violations reported to the Commission?

A. For a while.

Q. Many, many more you have already said.

A. After they indicted and prosecuted and fined a few there would be less and eventually there would be no problem at all.

Q. You expressed concern about an economic advantage enjoyed by an authorized carrier who operates leased vehicles over a carrier who operates only owned vehicles. Is that the particular concern here today?

A. So far as costs are concerned, and the rates established as a result of costs.

Q. Is that your principal concern?

A. As traffic manager, it is my principal concern.

Q. And it is your belief that those carriers—all carriers who use owner-operators can operate more cheaply than those who have only owned vehicles?

A. Generally speaking, that is true.

[fol. 2767] Q. And you think that should be prohibited?

A. It should be equalized. Nothing would be accomplished by that method that cannot be accomplished by ours, or else we should be permitted to adopt it on the same basis after it has been decided what is right. We don't think it is right and don't want to descend now to that level.

Q. You have no intention at the present time of cutting your rate level to that found proper by authorized carriers using owner-operators?

A. At the present time?

Q. At the present time.

A. We have no such intention.

Q. You have no such intention?

A. No.

Q. Do you feel at the present time that any authorized carriers using owner-operators, and who have lower rates than yours, should be required to increase their rates to your level?

A. If their proper costs can be determined, and those rates are found to be below their proper costs, I think the Commission has the duty to raise them, and if ours are too high to reduce them.

Q. Has anybody ever determined your proper costs?

A. I have seen the Bureau of Costs, Findings and Accounts in our office constantly, making us keep very voluminous figures and statistics, which we submit, and the books at home—which they publish—

[fol. 2768] Q. You mean the Commission has examined your accounts and required accounts from you as to your costs, and so forth?

A. Yes.

Q. Has the Commission ever told you your costs are proper?

A. I don't believe so.

Q. Has anyone other than your own organization decided that?

A. No one else has any reason to decide it.

Q. Will you please tell me what reason you have to decide what is the proper level of costs for some other operator who uses leased equipment?

A. I want the Commission to do that.

Q. You want the Commission to do that in connection with this investigation?

A. Whenever it is to come up fairly.

Q. And I assume you would like to have them decide what costs should be proper for your company?

A. Absolutely.

Q. You want them to do that before they settle the owner-operator question?

A. I think they could settle that tomorrow morning.

Q. Do you think it is fair to proceed against the man who uses owner-operators today and leave you alone?

A. I don't know anything in this investigation which would set the rates for a carrier using owner-operators. [fol. 2769] Q. Haven't you yourself suggested we should find out what the proper costs of the carriers using owner-operators are?

A. I don't think that is in this record.

Q. You said that is your reason for being here.

A. After the regulations are imposed and enforced they will show up all by themselves. The Commission won't have trouble finding them then. They can't find now.

Q. Aside from this lease you yourself have suggested, will you take those exhibits and point out to me what the Commission will be authorized to do by your suggestions that it couldn't do under existing regulations and law?

A. These suggestions are all proposed with the idea they can be done under existing law except the possibility that the law might have to be amended in one or two respects.

Q. You are talking about existing law and I am talking about existing law and regulations.

A. There aren't any existing regulations.

Q. There is a regulation governing safety of operation by an authorized carrier.

A. Yes.

Q. Do you assume if you hire an owner-operator to perform your operations you escape that obligation?

A. I don't believe you escape it legally, but you escape it. You don't care.

Q. Are you speaking for your own carrier?

[fol. 2770] A. We try hard to make them do things right and we don't get their cooperation and they tell us it is because no one else makes them do it.

Q. What don't they do?

A. They don't do anything. You know the regulation and they don't do it.

Q. Are you familiar with the exhibits offered for identification by Director Blanning?

A. I was here the first day.

Q. Have you seen the exhibits?

A. Yes.

Q. Do you disagree with the facts set up in the exhibits?

A. No, I don't.

Q. Are you in position to disagree with those facts based on a questionnaire submitted all over the country?

A. I couldn't disagree with them unless I find something wrong with them.

Q. How can you sit here and say the owner-operators do not comply with the safety regulations when the figures show that they comply as well as the authorized carriers generally.

A. I don't agree with you that the figures show that.

Q. If the figures show a certain compliance by owner-operators, you accept them as facts?

A. Whatever the figures show I accept as facts except to the extent something else has been put on to refute them, and I don't know of anything that is.

[fol. 2771] Q. You don't mean to tell the Commission that owner-operators have a disregard for all regulation such as life and brakes and so forth?

A. A good percentage have a disregard, but how much that is I will let the Commission discover. I am not a policeman, and I don't know. I know there is enough of them.

Q. In connection with leases of equipment, do you see anything improper in an authorized carrier operating equipment furnished by a shipper?

A. You are speaking of a special piece of equipment which a carrier can't maintain himself, or does not have? I think that can be placed in a tariff, and it is perfectly lawful if the tariff carries the whole arrangement and it is adhered to by both parties. I think it is all right.

Q. You know the Commission has specifically approved a number of situations like that?

A. Yes, I believe they have. That is not a problem.

Q. Have any of the drivers of your company ever resigned from your organization and taken other employment?

A. Yes, sir.

Q. Do you see anything wrong with one of them resigning and going to work for a shipper and driving a shipper's truck?

A. No, some have.

Q. Do you see anything wrong with a driver resigning and operating a leased truck for a shipper?

[fol. 2772] A. They have done that, too.

Q. Do you see anything wrong?

A. Yes.

Q. What is wrong?

A. The instrument the former driver enters into with that shipper is not a legal instrument, in my opinion. It does not set sufficient responsibility on the shipper. If the shipper has full responsibility I have nothing to say against it.

Q. I assume that you are attacking the lease I am about to describe.

A. I don't know what you are going to describe.

Q. I asked if the driver could quit and work for me as a shipper, if I own a truck, and if your driver could quit and work for me on a truck I have leased. Have you any objections to that?

A. I haven't any objections until I have had a chance to look into it and see if that is a true form of agreement of the kind prohibited by these conditions here.

Q. I am talking about the driver. Have you any legislation you might advocate about that driver working for me?

A. That driver might be a for-hire carrier without authority as a result of the agreement with the shipper. The

shipper might not know any different.

Q. We might have a lot of things.

A. That is why I want the Commission to look at it.

[fol. 2773] Q. If I lease a truck not from the driver, do you see anything unlawful about one of your drivers resigning from your service and going to work for me on my pay roll and driving the truck?

A. If the Commission approves it, I have no objection.

Q. If the lease is from Hertz Drive-It-Yourself, and I offer the driver more money to drive it for me, you think the Commission—

A. That would make you a contract carrier operating without a permit.

Q. Because I hired the driver that used to work for you?

A. It is the whole arrangement that has to be looked at to see the purpose and how it was executed.

Q. It has made me a contract carrier to rent a truck from Hertz and employ a driver who has formerly worked for New Brunswick Motor Express—

A. Not one factor but all might. I want the Commission to look into it.

Q. You want the Commission to investigate every situation?

A. In my proposed regulations you would submit it to the Commission five days before it became effective.

Q. May I disagree with you and point out that your suggestions relate to authorized carriers, and companies affiliated with authorized carriers? I have leased the truck from Hertz Drive-It-Yourself.

A. You might have created a subterfuge and gone around Robin Hood's barn to get what you wanted in the first place. I want the Commission to take a look see.

[fol. 2774] Q. You want shippers to be required to purchase trucks if they want to have a private carrier and not permit them to lease trucks to operate as a private carrier without specific permission from the Interstate Commerce Commission?

A. I would not prohibit the leasing but I would subject it to the safeguards of review by the Commission's Bureau of Motor Carriers which hatl to do with it, and if it was a good agreement I don't think anyone would object.

Q. Do you think that would require additional legislation?

A. I don't think so but that is interpretation of section 202. If it does take additional legislation I ask the Commission to seek it and get it. We ought to have it.

Q. Do you ask that the Commission ask authority to regulate private carriers to the extent that the operation is conducted in leased equipment?

A. You are still assuming now that they have not got that power?

Q. If they presently do not have it.

A. I dont want them to regulate the private carrier any further than they have already done, but I want them to regulate the instrument of leasing in the fashion you have described it, by looking at it and seeing it is O. K. before it goes through. If it is O. K. nobody can object.

Q. What difficulty do you anticipate they may find?

[fol. 2775] A. They may find the arrangement between the two parties includes a form of compensation, for example, that is based upon some published rate between the two parties that would make it for hire rather than private. There is a line of demarcation between for-hire and private carriers, but nobody seems to know what that is.

Q. So it is your opinion that any division of revenue is unlawful in and of itself?

A. As between two authorized carriers?

Q. As between two authorized carriers?

A. That is right.

Q. Going back to your first case in New Jersey, we have found that even if the Hertz Company leased that truck you would advocate some form of regulation by the Commission. I understand that an application was filed by someone to serve as a carrier, that same shipper.

A. There was.

Q. And it was denied?

A. First, the leasing was done and then it was denied.

Q. And when the application was denied the leasing was discontinued?

A. It is still under lease today.

Q. The trucks were under lease to a shipper?

A. First, they were, and then they were under lease to an authorized carrier.

[fol. 2776] Q. Is there any regulations you advocate that would prohibit that lease to the authorized carrier that now exists?

A. That can't follow these regulations.

Q. Is it fair to say these regulations are so complicated they cannot be followed?

A. No one who is out for tricks will be able to follow them. No one who is out to operate legitimately will have trouble with the regulations. The only one who may have trouble would be the man who was out for tricks.

Q. These regulations would prevent violations of the Interstate Commerce Act?

A. That is right.

Q. Have you given any thought to the application of these regulations to the fellows who are not violating the Interstate Commerce Act?

A. We all have to submit to regulation, whether good or bad. If there weren't any bad ones we would not have to submit to regulation. Good ones will have to be regulated, therefore.

Q. And the principal trouble with the bad ones is that they can operate cheaper than you can?

A. That is the result of—

Exam. Lawton: Haven't you been over that ground once, Mr. McAuliffe?

Mr. McAuliffe: Yes, I have.

Exam. Lawton: I understand the witness has to catch a train shortly after lunch.

[fol. 2777] Mr. McAuliffe: I have spoken to the witness about that.

By Mr. McAuliffe:

Q. Your Subject 2, Exhibit 31, suggests that no lease should be permitted for a period of less than one trip from a named point of origin to a named point of destination.

Would it be possible for you to give an example—

A. We have a person who leases a truck, and one man leases one-third to Trenton and one leases one-third to Philadelphia, and the other third is leased to someone else.

Q. Wouldn't that be from one named origin to one named destination?

A. A gypsy wants a lease before he goes anywhere—

Q. You mean they start from New York with half a load for one carrier and half a load for another?

A. First, he would have to have a full load or he would not be a gypsy.

Q. You mean he starts out with a full truck, consisting of two half-load shipments?

A. Yes.

Q. And he is going to deliver it at two points?

A. Yes.

Q. And your Subject 2 is going to prohibit that?

A. I dont' want half a truck leased to my competitor. Which shipment will he deliver first, mine or the other fellow's?

[fol. 2778] Q. Were you here yesterday?

A. Only part of the time.

Q. Did you hear the gentleman from United Aircraft in Connecticut testify?

A. I did not.

Q. He talked about leasing vehicles. Why would you consign leases to shippers to a period of not less than 30 calendar days?

A. I don't know that 30 is better than 180 calendar days. My interest is in having a continuous agreement which could be recognized as different from trip leasing.

The only thing is—I don't think trip leasing should be permitted in the case of shippers, but they should be permitted to make leases under a different form of agreement and with some continuity. I won't squabble with the amount of days.

Q. And there are some leases to shippers that you think, from your exhibit, might be lawfully and properly taken into consideration?

A. But not with authorized carriers.

Q. Not with authorized carriers?

A. No. The leasing companies or leasing people who are not in the carrier business.

Q. Wouldn't you permit an authorized carrier to lease a

shipper a truck to operate outside the territory that the authorized carrier serves?

[fol. 2779] Q. Will you look at Subject 4?

A. Sure. There are two provisions in there, for leasing of trucks from authorized carriers. In one case the shipper wants to make use of the authorized carrier to a point the carrier does not cover. In that case he submits the leasing agreement to the Commission—I am assuming there could be a legitimate leasing agreement of that kind—and I want the Commission to see it and decide.

In the second case the carrier might have the authority. One reason for entering into the lease would be to defeat the tariff. Then I want the tariff to show the arrangements so we can see whether it will defeat the tariff or not.

Q. You consider there are some leases that may be proper under proper approval by the body you suggest?

A. Yes, sir. I just want shippers to be regulated.

Q. Do you think of any reason why they should not be for a period of seven days?

A. If you as a lawyer think seven days is a different type of agreement within the scope of any argument, that is all right with me. I don't want to be pinned down on days.

Q. You do suggest 30 days?

A. I think the longer the time the better the agreement.

Q. Why?

A. If a man ties himself down to a contract, both parties have a—I don't have a legal word—but both have an interest in it. Both would be gaining from it.

[fol. 2780] Q. Would the shipper be gaining anything if it was a 30-day lease and he needed the truck for only seven days?

A. If he needed the truck for 30 days he would gain something. Otherwise the owner-operator could walk out on the third day and say, "I can get more money some place else."

Q. Could he walk out on the third day of a seven-day lease?

A. You fellows write the agreements; I don't.

Q. You wrote one here today.

A. The one I wrote here he can't walk out on. If he does we have a lawyer who will take him to court.

Exam. Lawton : Are you through, Mr. McAuliffe?
Mr. McAuliffe: No, sir.

By Mr. McAuliffe:

Q. Mr. Markowitz, Subject 9, sheet 4 of Exhibit 31. Would you conclude that compensation on a fixed percentage of revenue would be unlawful even if a lease such as you have suggested in Exhibit 32 had been enacted?

A. It would be unlawful? Yes.

Q. Why.

A. Only two authorized carriers can divide revenue; no one else.

Q. How do you distinguish between me paying 75 percent of $100 and paying $75?

A. I don't care how you get the result, but when you relate it to the percentage of revenue to defeat having two authorized carriers join in a proper tariff.

[fol. 2781] Q. Something to evade something and something that can be found after examination. How would you see through this subterfuge? Would you prohibit any sliding scale compensation regardless of the weight or value of loading carried by an owner-operator?

A. I would see to it that the scale reflected something more than the revenue.

Q. You would go back to costs?

A. That is where it belongs.

Q. Back to costs of the owner-operator without any investigation of the costs of various owner-operators.

A. We would probably have a choice of owner-operators. We have it now. I don't know that the Commission can give an owner-operator a license and say, "You are an owner-operator and you can do thus and so." I am not advocating that.

Q. Were you here in Washington on Monday, October 18th, at the hearing in this proceeding?

A. I will have to take a look.

Q. When an operator between Pittsburgh and New York testified in this matter?

A. Are you referring to Mr. Harvey?

Mr. Burton Wheeler: Harris.

The Witness: I read his testimony. I was not here.

By Mr. McAuliffe:

Q. Did you read his testimony that a great many owner-operators had been with him for many years and had [fol. 2782] added equipment during those years?

A. I know something about the case.

Q. Would you assume those operators had been losing money over all those years?

A. Mr. Harris testified, and what he testified is in the record. I can't assume anything like that.

Q. Don't you consider it improper for owner-operators to operate for authorized carriers for less than full costs plus a profit?

A. I consider it so. I don't know whether Mr. Harris did or not. I know the man, and I know that is not their general policy unless they take advantage of it—unless they are forced to.

Q. You don't know how to contradict testimony that owner-operators had worked for him for many years and had added equipment also used in their service?

A. I don't know what to do with that testimony. His is here, and mine is here. I don't know what to do with it.

Exam. Lawton: Off the record.

(Discussion off the record.)

Mr. McAuliffe: That is all I have.

Exam. Lawton: Who else?

Mr. Arpaia: In view of certain testimony developed by Mr. McAuliffe, I would like to ask a couple of questions.

By Mr. Arpaia:

Q. As traffic manager, you have made studies?

[fol. 2783] A. Yes, sir.

Q. What is the greatest proportion of hauling a pound of freight a mile? Is it pick-up and delivery or over-the-road?

A. Pick-up and delivery.

Mr. McAuliffe: Mr. Examiner, yesterday I was cautioned about cross-examining several times. I don't know

the particular interest of the attorney now questioning. He is questioning for the second time. I would like to point out that he may have questions based upon testimony I have adduced here, which should give me the right to ask questions on the same subject. I want to mention that in view of the caution of the Examiner as to trying to expedite the proceeding.

Mr. Arpaia: There are certain elements of costs of the gypsy against the bona fide operation that were not brought out on direct at all.

Mr. McAuliffe: I am not objecting.

Exam. Lawton: This man is not connected with costs anyway. This man is not an expert on costs. It is well known that general common carriers have a great proportion of costs and pick-up delivery. That is pretty well accepted.

By Mr. Arpaia:

Q. The next question: From your experience and observation do you find gypsy operators are interested in miscellaneous freight?

A. No, they are not.

Q. Would they go 30 miles to pick up a 100-pound package for $1 or $1.25?

[fol. 2784] A. I never saw one do it.

Q. Would the shipping public be better served by gypsy operation described by Mr. McAuliffe?

A. No.

Q. Does the public get better protection by bona fide operations by fleet owners or by gypsies?

Mr. Ellis: The indiscriminate use of the word "gypsy" —this witness said he trip leased and he engaged in that practice. He also said there are certain gypsy operations on which he frowned, and this counsel is trying to intermingle them.

By Mr. Arpaia:

Q. A trip lease and a gypsy is the same thing to you?

A. No, it is not. A gypsy is a fellow who operates based on trip leases.

Q. That is a gypsy operation?

A. We are trip leasing and not gypsying.

Q. Would the owner-operator who participates in a trip lease better protect the public as regards safety on the highways and other protective regulations than the owner of the fleet, from your observation and experience?

A. The owner of the fleet will give better protection.

Q. From your observation and experience when you turn in trucks for new vehicles, who buys those trucks?

A. The gypsies.

[fol. 2785] By Mr. Wells:

Q. Mr. Markowitz, do you know any of the owner-operators from whom you trip lease who own new equipment?

A. The particular one I described has bought some new equipment.

Q. How long have you been trip leasing?

A. I guess we have been trip leasing ever since I have been with them. It has been prominent in the last few years than it had been previously.

Q. Did you engage in that to a considerable extent during the war?

A. During the war I think the whole territory was engaged in trip leasing with the encouragement of O.D.T., and everyone else.

Q. Was that for the purpose of utilizing equipment and avoiding empty return movements?

A. It had to be done.

Q. In your judgment did that promote economic use of equipment?

A. At that moment we were more interested in moving things.

Q. Did it result in moving more traffic in the same number of vehicles?

A. It was like a voluntary pooling arrangement.

Q. In your judgment was the operation a more complete, efficient, and economic utilization of the equipment?

A. Using all equipment, it was, but I happen to know that individual operators were more inefficiently and uneconomically handled.

[fol. 2786] Q. You made money then?

A. We did, and we were also winning the war. I believe in winning a war and not talking about ways.

Q. Have you had any experience with trip leases, one way, and not roundtrip?

A. Yes, during the war particularly.

Q. Was that because of the heavier volume movement in one direction than the other?

A. Yes. The War Department and Navy Department thought nothing of asking a trucker to handle 500 loads of freight from New York to Philadelphia, and no one was equipped to do such a thing, and the gypsies did come into the picture then.

Q. When there is a large volume of movement by motor vehicle by common carriers in one direction so their movement in the return direction would be to a considerable extent almost wholly empty, would you not consider it efficient and economic for those common carriers to trip lease available equipment for the one-way trip in the direction of their heavy haul?

Mr. Eldred: Were you referring, Mr. Wells, to common carriers operating under authority from the Commission of the so-called exempt carriers hauling agricultural commodities?

Mr. Wells: I am referring to the common carriers with a heavy haul in one direction. I am not qualifying the type of vehicle they lease in the direction of the heavy haul. I said there was available heavy equipment.

[fol. 2787] The Witness: I think my answer might clear that up for you.

If I am a common carrier operating my equipment in one direction and coming back light, and you are a common carrier, both authorized, I see nothing wrong in my leasing my equipment to you for the return trip.

I am worried about his starting out with a gypsy who leases himself to you to come back.

By Mr. Wells:

Q. You do understand, Mr. Markowitz, that where there is a lease from one common carrier to another for a more complete utilization of equipment, and avoidance of a light haul, that is efficient and proper?

A. I would like to see it encouraged.

Q. And because the owner of the vehicle may be someone other than a certificated carrier do you think it makes a difference in the efficiency and economy of the operation?

A. It does.

By Mr. Eldred:

Q. As I understand your answer, Mr. Markowitz, to Mr. Wells, that can only apply where both common carriers hold authority from the Commission.

A. Yes, and both operated their own equipment.

Q. That would not apply to the so-called exempt carriers?

A. Like the agricultural hauler?

Q. Yes.

A. I haven't made up my mind what they should do. You are not asking that, are you?

[fol. 2788] Q. I am asking if your answer to Mr. Wells' question included any reference to those carriers?

A. No.

Q. Have you read the minority report of the A.T.A. Leasing Committee?

A. I read a minority report from a household goods carrier witness yesterday, C. J. Williams. That seems to have to do with household goods operation. Is that the report you are referring to?

Q. Yes.

A. I was here only long enough to hear a bit of Mr. Williams' testimony. I gathered he was a household goods carrier.

Exam. Lawton: You must have the wrong Mr. Williams. This exhibit was introduced at the St. Louis hearing.

By Mr. Eldred:

Q. Do you see at the present time how the Commission can institute a sound transportation policy for the industry, not only for motor but rails and other forms of transportation unless the carriers own their equipment, or a great portion of it?

A. I am not so sure I want to give you an answer on that basis. I don't particularly worry about whether the equip-

ment is owned or obtained in other fashions. I know many motor carriers say they own their equipment but it is owned by finance companies. My point is that it should be owned in a manner conducive to sound transportation [fol. 2789] inaugurated by Congress, and that this Commission should regulate it equally for all concerned so we won't have a part of the industry running wild in one-half the industry and creating these problems for the other half. Half of the industry cannot serve the public; it will take all.

Q. Do you think you could serve your shippers on the basis of trip leases?

A. Our shippers are demanders of service. That costs money. You can't give that service on trip leases.

Exam. Lawton: Do your trip lease owner-operators handle less-than-truck-load freight for you?

The Witness: They do between terminals and also on pick-up and delivery routes designated by us, regular routes. They are never permitted to go out on an irregular route operation and disappear.

Exam. Lawton: Am I correct in assuming that they will handle it only where they have a full truckload of freight?

The Witness: Yes. It might be full shipments, but it is a full load and those shipments are not based on a percentage of revenue.

Exam. Lawton: It would be rather difficult, wouldn't it, because you have so many rates.

The Witness: Yes.

Exam. Lawton: Do they consider that desirable traffic?

The Witness: Apparently they do because they work the [fol. 2790] straight figure. They know what they will get every day, and at the end of the week they know what their income will be. Whether it is enough for them I don't know. They will have to answer that.

By Mr. Eldred:

Q. As to your testimony as to accidents on Route 1, and violations you have observed, were they operators that were operating longer distances than the average haul of your company?

Mr. Diehl: I object to that. I don't think observing a violation at New Brunswick, N. J., would give this man any information as to how far this vehicle was traveling.

Mr. Eldred: I will ask about operations he has had personal knowledge of and has had cause to witness or investigate.

The Witness: Long-distance haulers have more accidents than short-distance haulers. We have them, too. We are not lily white.

By Mr. Todd:

Q. In your opinion, does the Commission, under section 202 of the Interstate Commerce Act, have authority to impose regulations which you have suggested here on persons such as Hertz Drive-It-Yourself?

A. I don't know. I hope they do, not because I want them to do it to Hertz, but because I want some of the fellows who are in it caught. I am not after Hertz.

Q. You suggest some of the regulations you suggested here imposed on all carriers alike, whether motor carries or in the position of Metropolitan Distributors, or someone [fol. 2791] who has no motor carrier authority.

A. I believe that will require additional legislation. I imagine section 202 does not seem to cover that situation.

Exam. Lawton: You have said a number of times all regulation should be equally applied.

The Witness: That is my interest. The good fellows won't object to good regulation and the bad ones will.

By Mr. Todd:

Q. In order to apply the regulation on the leasing of trucks to shippers it would be necessary to procure additional legislation?

A. I am afraid so, but I am not sure.

Exam. Lawton: He is not a lawyer. I think we should recess for lunch.

Mr. Diehl: One question, Mr. Examiner.

By Mr. Diehl:

Q. Mr. Markowitz, I believe you said in answer to a question from Mr. Wells that you had not made up your mind as to agricultural exempt carriers, as to what should be done.

A. No, I have not.

Q. When you do will you come back?

Mr. McAuliffe: The term "gypsy" has been used in your examination a number of times. Would you call all the owner-operators that you employ gypsies, as you understand that word?

The Witness: No.

Exam. Lawton: If there is nothing further, you are excused.

[fol. 2792] (Witness excused.)

Exam. Lawton: Exhibits 31 and 32 are received in evidence.

(Respondents' Exhibits Nos. 31 and 32, Witness Markowitz, were received in evidence.)

Exam. Lawton: Before we recess, a number of witnesses for the railroads are here whose testimony should take only a short time if counsel will agree if it is prepared it can go into the record.

I suggest you try to get together on that so that the afternoon can be taken up with the cross-examination of Mr. Sutherland.

Mr. Todd: Before we recess for lunch, I want to make a statement for the record which might eliminate the possibility of putting another witness on the stand?

Exam. Lawton: What kind of a witness?

Mr. Todd: I have Mr. C. B. Fishback of the Fishback Trucking Company in the hearing room. He is a contract carrier and his testimony will go to the same matters as the testimony of Mr. Ratner, whom we heard in St. Louis, and it would be merely cumulative. I do want the record to show his situation is the same as Mr. Ratner's.

Exam. Lawton: Your statement is noted in the record.

We will recess for lunch until 1:30.

(Whereupon, at 12:20 p. m., a recess was taken until 1:30 p. m. of the same day.)

[fol. 2793] Afternoon Session.

Exam. Lawton: Come to order, please. We will resume the hearing.

Is there any objection to having Mr. Melia's statement copied into the record to save time, without reading it?

FRANCIS J. MELIA was sworn and testified as follows:

Direct Examination.

The Witness: My name is Francis J. Melia. I am assistant general counsel for Union Pacific Railroad at Omaha, Nebr. I am admitted to practice before the Commission. Insofar as this statement is concerned, I prepared it personally.

Exam. Lawton: If there is no objection, the statement will be ordered copied into the record.

(The statement is as follows:)

The interest of the Union Pacific in this proceeding stems from the fact that it now has pending before the Commission three applications, namely, two under sections 206 and 207 of Part II of the Interstate Commerce Act and one under section 5(2) of the Act for authority to engage in motor truck operations along its rail lines from Council Bluffs, Iowa, Kansas City, Mo., and St. Joseph, Mo., on the east through Denver, Colo., and Cheyenne, Wyo., to Pocatello, Idaho, and Salt Lake City and Lynndyl, Utah, on the west. The service which the Union [fol. 2794] Pacific expects to perform, in the event it secures the necessary operating authority under these applications, will be confined entirely to that which is supplemental and auxiliary to its rail service; that is, all freight so handled will be transported at rail rates on rail billing under the restrictions which the Commission usually imposes on this type of operations. In conducting this motor truck service it is not the intention of the Union Pacific to purchase vehicles, at least at the present time, but rather we intend to secure vehicles mainly from companies who are in the business of hiring out this type of equipment on a fully manned basis.

At the present time the Union Pacific has several contracts with Motor Express Rentals Corporation of Chicago for furnishing motor vehicles on a fully-manned basis to perform pick-up and delivery service at the larger cities reached by its rails. This arrangement with the Rentals Corporation has worked out very well because it has afforded to us the services of an organization which is fully equipped, both from the standpoint of equipment and personnel, to conduct this terminal service for account of the railroad. The drivers of these vehicles are, of course, the employees of the Rentals Corporation. At the smaller points the Union Pacific continues to use the services of numerous small dray lines.

The leasing arrangement which is now contemplated will not only avoid large expenditures for purchase of motor [fol. 2795] vehicles and acquiring of garage and repair facilities, but will make available to the Union Pacific equipment, personnel and maintenance service of companies who have long been in this type of business. It is not the intention to lease vehicles from or to any shipper. Neither is it our intention to have any exchange or interchange arrangements of equipment whatever with any other motor carrier. Consequently there will be no opportunity for the motor trucks, trailers or tractors of other carriers to operate under our certificates.

The form of agreement which the Union Pacific proposes to enter into mainly with equipment rental companies for securing and leasing vehicles on a fully manned basis will provide (1) that such vehicles shall be operated under the supervision and direction of and on schedules fixed by Union Pacific officers; (2) that such vehicles shall transport only freight for the account of the Union Pacific; (3) that such vehicles will be loaded and unloaded by station and terminal forces of the Union Pacific except at such times of the day when agents at small towns are not on duty, when the drivers of the vehicles will do this work; (4) that the vehicles will be licensed and registered in the name of the Union Pacific if permitted by State laws and the Union Pacific will pay all ton-mile taxes, highway taxes, and compensation fees assessed against the vehicles by the several States for the use of the highways; (5) that

drivers of the vehicles will, if so requested by the Union [fol. 2796] Pacific, give receipts to it for all freight received from and take receipts from it for all freight delivered to the freight houses and other terminal facilities of the Union Pacific, such receipts to be on forms prescribed by the Union Pacific, and the drivers shall keep and furnish such other records and reports with respect to the operation of the motor vehicles and the transportation of the freight as the Union Pacific may request; (6) that drivers of the motor vehicles shall be and remain the sole employees of the lessor and not the employees of the Union Pacific; (7) that insurance shall be carried on said motor vehicles in the name of both the lessor and the Union Pacific, thus complying with section 215 of the Act; (8) that compensation payable by the Union Pacific for use of such vehicles shall be on a uniform rate per mile whether or not they are loaded or empty; (9) such agreements will be for a fixed term without termination clause except in case of default or inability of the Union Pacific to use the vehicles by reason of any law, ordinance, or regulation, for at least one year and probably two years.

The contractual basis upon which the Union Pacific proposes to lease motor vehicles on a fully manned basis to conduct its coordinated rail-truck service is almost identical with the arrangement which the Commission dealt with and approved in Railway Express Agency, Inc., Extension of Operations, 44 M.C.C. 771, wherein it was said at page 774:

"So far as the responsibility 'to the shipper and the pub- [fol. 2797] lic generally' is concerned, it is clear that the Agency assumes full responsibility. Any enforceable claims arising out of the operation would be paid by the Agency. The fact that the Agency may be reimbursed by the operator would not in any way shift from the Agency to the operator the former's responsibility to the shipper or the public generally."

In deciding to lease rather than purchase motor vehicles the Union Pacific has no intention whatever of avoiding or circumventing its responsibilities either to the public or to the Interstate Commerce Commission as a motor carrier of

property. The vehicles themselves will be painted according to Union Pacific specifications and identified as under control of the Union Pacific. Furthermore, they will be permanently marked in accordance with the certificate requirements of the Interstate Commerce Commission and the several State commissions.

It is our definite intention that the drivers of the vehicles will have no contact with the shipping public, rather all handling and billing of such freight will be done by Union Pacific forces and the shipping public will have no relations with anyone other than employees and agents of the Union Pacific. If any freight is damaged or lost while being transported in these vehicles necessarily the consignee or consignor will file his claim with the Union Pacific and will be under no necessity of dealing with the lessor of the equipment.

The Union Pacific realizes and expects to assume its [fol. 2798] responsibility under the Commission's rules and regulations pertaining to safety, physical examination, hours of service, mechanical standards, and keeping of drivers' logs, and all this is contemplated by our method of operation. Also, the vehicles furnished to us under these leasing arrangements will be properly inspected before they are taken into our service and thereafter to see that they meet the safety regulations of the Commission. Here I might add that due to the fact that our scheduled runs are comparatively short, we anticipate the minimum of difficulty in complying with driving hours and log regulations.

From what has been said it will be seen that all of the motor vehicles which the Union Pacific intends to lease in conducting its motor truck operations in supplemental and auxiliary service will be identified and operated in such a manner that the public cannot possibly be misled as to who has the exclusive possession and control of such equipment. We have in mind that proper identification is important in eliminating the abusive practices which the Commission seeks to end by its proposed rules and regulations. Vehicles which are permanently a part of the vehicle fleet of a carrier such as the Union Pacific need not, in our opinion, be subjected to the same degree of regulation and

control that would be necessary when vehicles are on a short term lease or are being continually exchanged and interchanged as between carriers. Consequently when a vehicle is permanently identified as being in the exclusive [fol. 2799] possession and control of a lessee, such as the Union Pacific, it seems to us that it is unnecessary for the lessee's driver to be required to carry a certified copy of the lease as the Commission would require by paragraph j of Rule 2.

The most important objection which the Union Pacific has to the proposed rules and regulations of the Commission is to paragraph h of Rule 2, which provides that the person assigned to drive the equipment shall be "an employee of the carrier." One of the principal advantages accruing from our ability to lease motor vehicles resides in the fact that the owner-lessors of this equipment have been in this type of business for many years and have built up an experienced and qualified personnel, both to maintain and drive the vehicles and as a result of that long experience they are well equipped to perform the whole service from a physical and personnel standpoint. The lessors of this equipment claim no operating authority of any kind over the routes upon which it will be operated under the direction and control of the Union Pacific. As we see it, nothing will be accomplished by this proposed rule from the standpoint of additional protection to the public, bearing in mind that proposed rule i requires that the certified carrier—the lessee of the equipment—

"* * * will exercise full control, direction, and domination of the service and accepts full responsibility to the general public, shipper, and Interstate Commerce Commission for the transportation furnished to the same extent as if it [fol. 2800] were the lawful owner of the equipment * * *."

A further objection to this rule is that the owners of available equipment have indicated to us that they are extremely reluctant to lease us vehicles for operation by our employees. I have heretofore mentioned the advantage which the leasing arrangement has in the direction of avoiding expenditures on our part for vehicle maintenance and garage facilities.

Inasmuch as the Commission has seen fit to place the railroad industry in a separate category when dealing with

applications for operating authority under Part II of the Act, it occurs to us that the Commission might properly except the coordinated rail-truck operation from the rules and regulations proposed in this proceeding. It is more or less common practice for railroads and their affiliates who are performing supplemental and auxiliary trucking service to lease motor vehicles on a fully manned basis and the Commission has observed this practice in numerous decisions.

See, for instance, Illinois Central Railroad Common Carrier Application, 12 M.C.C. 485. Bearing in mind that railroads performing this coordinated type of trucking service do not have vehicle interchange arrangements with other motor carriers, but rather confine the use of their equipment to their certificated routes, the situation of lines such as the Union Pacific is entirely unlike that existing with general commodity truck lines generally. It will be remembered that the Commission by the usual condi- [fol. 2801] tions which it imposes in certificates issued to railroads reserves the right to impose such further conditions in the future as it deems necessary, the apparent purpose of this reservation being to keep a close hand on the motor carrier operations of railroads to the end that the service rendered thereby will be closely coordinated with the rail operations.

The Union Pacific has no desire to avoid reasonable and practicable rules and regulations governing the leasing of vehicles. However, we do feel that the coordinated rail-truck operations call for individual consideration for the reasons hereinbefore stated, and, consequently, the Commission might properly place such operations in a separate class for the purpose of regulating their motor vehicle leasing arrangements.

I might say here that the Union Pacific has no objection to furnishing the Commission with a copy of any agreement which it makes for the leasing of motor vehicles used in performing its coordinated rail-truck service.

In the event the foregoing suggestion does not meet with the approval of the Commission, we offer the following alternative: Paragraph k of Rule 2 presently reads as follows:

"The provisions of paragraphs a, c, d, and h of this rule shall not apply to operation of equipment by any carrier in accordance with a plan heretofore submitted by such carrier in a formal proceeding and specifically approved by the Commission."

[fol. 2802] There are now in effect a number of arrangements under which railroads lease motor vehicle equipment on a fully manned basis, and as heretofore stated the Commission has taken cognizance of that fact in numerous cases involving railroads.

Applying paragraph k literally, it would seem to approve leasing arrangements of this kind heretofore made but that such arrangements hereinafter put into effect must provide that the driver of the vehicle, for instance, shall be the employee of the carrier. The point is that if the Commission has sanctioned the leasing of motor vehicles in the past on a fully manned and operated basis, we see no reason why it should not continue to approve such arrangements for the future. Furthermore, we see no reason why approval of such arrangements in the future should be the subject of a formal proceeding. Certainly there is nothing adversary in character about such a plan of operation and the Commission should be able to determine itself without the intervention of other parties whether or not such a leasing arrangement is upon a bona fide and practical basis. Accordingly, our alternative proposal is that paragraph k be amended to read as follows:

"The provisions of paragraphs a, c, d, h, and i(2) and i(3) of this rule shall not apply to operation of equipment by any carrier in accordance with a plan heretofore or hereafter submitted by such carrier to the Commission and approved by it."

In suggesting that reference to paragraphs i(2) and i(3) [fol. 2803] be made in paragraph k, we have in mind that the requirement of those two provisions would be cumbersome and unnecessary and could well be dispensed with in the case of agreements covering coordinated rail-truck service as contemplated by the Union Pacific which provide for payment of rental on a uniform rate per mile and with the leased equipment being exclusively devoted to their service for a definite and extended period.

We appreciate the opportunity which the Commission has given us to state the views of Union Pacific Railroad Company in the matter of this proceeding.

Exam. Lawton: Is there any cross-examination?

The Witness: I might add that this statement deals entirely with the proposed operation which the Union Pacific has in mind, coordinated rail-truck service.

At the present time we have no such operation but we have applications pending before the Commission to conduct such an operation between Kansas City and Omaha, on the east, through Cheyenne and Denver, terminating at Lynndyl, Utah, which is south of Salt Lake City, and at Pocatello, Idaho.

It is hoped that such operations will be started shortly after the first of the year.

Cross-examination

By Mr. Burton Wheeler:

Q. I notice you say: "The form of agreement which the Union Pacific proposes to enter into mainly with equipment rental companies for securing and leasing vehicles [fol. 2804] on a fully manned basis will provide (1) that such vehicles shall be operated under the supervision and direction of and on schedules fixed by Union Pacific officers; that (2) such vehicles shall transport only for Union Pacific; (3) that such vehicles will be loaded and unloaded by station and terminal forces."

What is the idea of the Union Pacific wanting to get them on a rental basis or fully manned? It is not because the Union Pacific has not the finances to buy them?

A. We feel, first, the service can be performed more economically by the firm with which we are now conducting negotiations. It is an equipment rental firm that conducts that line of business exclusively.

I might say that presently this same firm supplies vehicles to the Union Pacific for performing such pick-up and delivery services at Kansas City, Salina, Denver, Salt Lake City, Portland, and shortly will do the same thing at Kansas City. It has worked out very well.

Heretofore we have contracted with a number of small draymen in the large metropolitan cities to do that. Rather than buy our own vehicles we made arrangements with the Eastern Company to supply the vehicles on a fully-manned basis. They furnish the gasoline and keep them in repair. In those instances where it is necessary we get the local certificate.

For instance, in Salt Lake City we require a permit from [fol. 2805] the State Commission to perform the terminal pick-up and delivery service. It is not true of Salt Lake City or Denver. It is true of Portland and also Seattle.

The public has no information or knowledge that those vehicles are leased. They are stamped and protected according to Union Pacific's specifications.

Exam. Lawton: Are you to handle only railroad freight in these vehicles?

The Witness: Only railroad freight, and I might say for the benefit of you gentlemen who may not have read that through, that the compensation will be so much per mile whether or not the vehicle is loaded. The vehicle will never leave the certificated route of the Union Pacific.

We do not have in mind interchanging with anyone. The drivers will have no contact with the public whatsoever. It will be a terminal-to-terminal service between freight house and freight house, or station and station. It will move on rail billings at rail rates.

By Mr. Pou:

Q. You have in here probably some statement with respect to the responsibility or liability of the railroad company to comply with the Commission's safety regulations.

A. Yes, indeed.

Q. Does it fully recognize the responsibility of the railroad company to see that the drivers keep logs and comply in full with the obligations?

[fol. 2806] A. We would assume the responsibility and comply with all the insurance requirements of the Act. No distinction in that regard. Our liability to the public is not lessened one bit by reason of this leasing arrangement.

By Mr. Lordan:

Q. The contract or lease arrangement between the Motor Express Rentals Corporation of Chicago furnishing the motor vehicles proposed and the Union Pacific—will it be submitted to this Commission for approval at the time of application for a certificate of public convenience and necessity to provide the service proposed?

A. Presently we have no formal contract executed, but I might say that within the past ten days there has been the subject of a formal proceeding at Omaha which the Union Pacific Motor Freight Company filed under section 52 of the Act for authority to acquire the operating rights of Nielson & Peterson. Presently that is a motor truck operating company per se.

If the Union Pacific is given permission to acquire those operating rights they will confine that service in the future to a coordinated rail-truck service handling only freight, rail freight, at rail billing.

I attached to the application a copy of the contract which we will make with Nielson & Peterson for furnishing vehicles in the future on a fully manned basis. I don't know if that was an issue in this case.

One of my assistants handled the case. I don't think it [fol. 2807] was put in as an issue in the case, but a copy of the contract was furnished the Commission for their information.

Q. As I understand you, from what little time I have had to glance at this, the Union Pacific Railroad Company proposes eventually to operate a coordinated motor truck-rail transportation service between the eastern portion and western portion of its rail lines.

A. Yes, eventually.

Q. And the service will eventually be performed by this truck leasing or rental corporation?

A. We will have the certificate in our name.

Q. But the actual physical operation will be performed by the—

A. They will supply the vehicle and employ the driver but he will operate according to our supervision and direction at all times.

Q. And it is in the terminal-to-terminal operation that you describe that your statement applies with relation to the drivers or employees of the Motor Truck Express Rentals Corporation having no contact with the public?

A. That is right.

Q. That same situation is not true with relation to pick-up and delivery?

A. That is true, that is not involved in this proceeding.

Q. With respect to your pick-up and delivery operation, which is in some manner comparable to a drayage opera-
[fol. 2808] tion, the employees in that operation do contact the shippers and receivers?

A. In the same manner as these numerous draymen. For instance, at Kansas City up to six months ago I think that we had contracts with 42 independent draymen to perform this pick-up and delivery service. We found it very cumbersome.

Q. Then the employees of the Motor Express Rentals Corporation perform the actual same and similar service as that heretofore performed by 42 draymen?

A. Yes.

Q. They contacted the shippers, received freight, delivered the freight, and made appropriate notations on the bills as the Union Pacific agent?

A. That is right, in the same manner as the independent draymen did formerly.

Q. But they were employees of the Motor Express Rentals Corporation?

A. That is right.

Q. At the same time acting as agent of the Union Pacific?

A. That is right. Of course, this arrangement is provided for by tariff.

Q. You mean pursuant to rail tariff?

A. Pursuant to rail tariff, and the Commission has always held that pick-up and delivery service comes under Part I of the Act.

[fol. 2809] By Mr. Boot:

Q. On page 9 of your testimony you state that you believe the railroads should be exempt from any rules and regulations proposed by this proceeding. If this Com-

mission should state that trip leasing should be eliminated and prohibited, do you not believe the railroads should also be required to not trip lease?

A. Indeed I do. If the Commission forbids trip leasing we have no intention of indulging in the practice.

Q. Suppose the Commission should come out and say, "All payments shall be on a ton basis." Do you think you should also be covered by that ruling?

A. We have no objection. From an accounting standpoint it is certainly burdensome.

Q. What had you in mind on page 9 when you made the statement that they should be exempt from these rules? It is right about the middle, the fourth line of the second paragraph.

A. I had in mind, as I stated before, that we intend to confine these vehicles to our own certificated routes. At no time will they ever get off those routes. We don't intend to interchange the vehicles at all.

As you probably know, whenever the Commission approves an application under section 206 or section 52, as one of the conditions they attach five paragraphs which provide that the freight handled will be coordinated rail-truck service. On rail billing we will serve only our own [fol. 2810] rail service. They attach either the key point restriction or the common switching haul restrictions, and they return jurisdiction to attach such further conditions as they may in their further judgment deem necessary.

The Commission has always found these rail operations either under 52 or 206, separate and apart from applications for straight trucking operations. I have in mind trucking operations per se, like handling truck billing, interchange with other carriers—

Q. Is there no possibility that the Union Pacific would interchange with some other carrier at some time?

A. We would certainly not interchange equipment.

By Mr. Burton Wheeler:

Q. Do you consider this trip leasing, or are you going to employ them for a definite period of time?

A. The contract we have made with Nielson & Peterson is for a period of two years without termination.

Q. To do what?

A. To furnish these vehicles on a fully manned basis.

Q. Would they be employed all the time in your work?

A. They would be on the pay roll of Nielson & Peterson, and they would be their employees, but the lease agreement itself is for a fixed term of two years. It has an escalator clause in the compensation provision.

Q. While your contract runs for two years to do a specific job, would they be under your supervision to the ex-
[fol. 2811] tent that they would be employed all the time in your particular work?

A. That is right.

Q. In other words, they would not be delivering part time for some other company and part of the time for you?

A. Oh, no. The vehicles are identified as our vehicles. We take up the licenses. The employees will take the vehicle out of Omaha on a schedule which we designate under our schedule from the Interstate Commerce Commission and run it approximately 150 miles. It has the Union Pacific name all over it and it would never get into the hands of someone else for a period of two years unless it broke down and would be sold.

Q. The employees themselves would be permanent employees of Nielson & Peterson?

A. The employees themselves would be permanent employees of Nielson & Peterson.

Q. Would they be part of the time employed to run your trucks and part time employed to run someone else's trucks?

A. Employed to run our trucks.

Q. What is the advantage you think the Union Pacific would gain by it?

A. We feel, and I am restating the views of our operating department, that the Motor Express Rentals Corporation, or any other equipment rental company with whom we can contract, can perform this service cheaper than we can. They are in that business. We avoid substantial capital
[fol. 2812] expenditures, the building of garages, keeping these vehicles repaired.

Motor Express Rentals Corporation have arrangements for repairing the vehicles. At Kansas City we have probably 20 vehicles repaired at all times. They can do it cheaper and more efficiently than we can.

Q. You think they are experienced in the business while the railroad is not?

A. That is right, but I want it definitely understood that these vehicles will be operated under the direction and control of the Union Pacific at all times. We intend to set up an organization to run this operation.

Q. The question under the present law is whether or not the employees are really employees of the Union Pacific or not.

A. I don't think there is any question about that. I have gone into that fully.

Exam. Lawton: Does anyone else have any questions? Off the record.

(Discussion off the record.)

Exam. Lawton: If there are no other questions, you are excused.

(Witness excused.)

OFFERS IN EVIDENCE

Exam. Lawton: Is there another rail witness?

Mr. Brown: My name is Francis L. Brown. I appear in this case on behalf of the New York Central Railroad Company.

I have here for submission a petition for exemption [fol. 2813] under rule 2(k), or, in the alternative, provision made for exemption of this so-called coordinated service similar to that testified to by the previous witness.

I would like to submit at this time a petition along with a statement by our supervisor of stations and motor service. It is a four-page statement and I would like to submit it in lieu of his testimony, if there is no objection.

Exam. Lawton: Pass the document out to the parties.

Is there any objection to receiving it as an exhibit?

Mr. Ellis: I have no objection to receiving it as an exhibit, but I think to start petitioning for exemption from the rules is a little premature, to say the least.

Mr. Brown: The basis of our petition is that what we are petitioning for is an exemption or interpretation of proposed rule 2(k). I agree that these rules have not been passed, but in the event rule 2(k) as proposed is adopted then we submit we should be included within the interpretation of that rule.

Exam. Lawton: This document does describe the modus operandi of the New York Central in its trucking operations. Is that correct?

Mr. Brown: The petition does do that, Mr. Examiner. The petition is directed in Point 1 to the interpretation of rule 2(k). We don't know at this time what rules will be proposed. We can only assume at this time that the rules as they now stand might all be adopted. That is the reason [fol. 2814] we are submitting this petition at this time.

The statement which starts on page 11 is a statement of our superintendent of stations and motor service, which is a brief outline of our proposed operation under this authority. Our authority is the same authority which the previous witness testified to. It is coordinated service which allows us to transport under our own authority property in auxiliary or supplemental service to that of rail carriers.

Exam. Lawton: If there is no objection, it will be received as Exhibit 33.

(Respondents' Exhibit No. 33. Witness Brown, was received in evidence.)

Mr. Lordan: I have no objection to the statement of the Witness Hill being placed in evidence just the same as if testified to from the witness stand. I would like to ask counsel, on the first page designated "Verified Statement of C. S. Hill," whether or not the order referred to in the second paragraph, dated March 15, 1948, in M.C. 67916, Sub 3—whether or not the plan of operation under the method now being conducted by the railroad was submitted to the Commission at the time of the hearing on the matter which was determined by that proceeding, or if there has been a determination on that proceeding.

Mr. Brown: Yes, that plan of operation was fully explained to the Commission. There were about—if I recall correctly—four extensive hearings held on this application

[fol. 2815] at which time the plan of operation was fully explained to the Commission, and that is one of the points that we discuss in our so-called exception, or, the petition for exemption, namely, that the plan was presented to the Commission and approved by the Commission.

Mr. Lordan: As a result of this determination in the cause referred to in Mr. Hill's statement?

Mr. Brown: Yes.

Exam. Lawton: Since the matter is in here I cannot receive that as testimony but it will be accepted as an exhibit to explain the proposed operations of the New York Central.

Mr. Ellis: May I ask one question? Is your railroad company a member of the Rail Carriers Trunk Line, Central Freight, or New England Freight Associations, or all of them?

Mr. Brown: Yes, we are.

Mr. Marx: My name is William H. Marx. I represent Railway Express Agency, Inc. We have a witness prepared to testify and have his testimony in typewritten form. The testimony to be given by the witness involves three factors.

(1) It supports and refers to the testimony given by the Illinois Central Railroad and the Atlantic Coast Line Railroad and the L. & N. Railroad as to l.c.l. freight operations performed by the railroad, for which the Express Agency furnishes equipment and drivers.

Exam. Lawton: Where is the witness?

[fol. 2816] Mr. Marx: The second class of operation about which—

Exam. Lawton: Suppose you let him explain that if he is going to testify.

Mr. Marx: I thought it wouldn't be necessary to read the complete testimony.

Exam. Lawton: Since he will be sworn and be available for cross-examination we might as well wait for the witness.

Off the record.

(Discussion off the record.)

Exam. Lawton: Is there any objection to the prepared statement of Witness Gross being copied into the record?

Mr. Ellis: No.

Exam. Lawton: Hearing none, it is so ordered.

(The statement is as follows:)

STATEMENT OF PAUL GROSS, JR.

My name is Paul Gross, Jr. I am general auditor of Railway Express Agency, Incorporated, with offices at Chicago, Ill. I have been employed by the company for more than 46 years and have been general auditor 13 years.

Railway Express Agency, Incorporated, was incorporated in the State of Delaware December 7, 1928, and commenced operations on March 1, 1929. It and its predecessors have been engaged in the express transportation business for a period of more than 100 years. In the conduct of its business it utilizes rail, water, motor and air facilities.

Prior to July 1, 1918, the express transportation business [fol. 2817] was conducted in this country by several independent express companies, and on July 1, 1918, they were consolidated into a single organization known as the American Railway Express Company.

Railway Express Agency, Incorporated, is owned by the principal railroads of the country. It is subject to Part I of the Interstate Commerce Act and its rates, tariffs, and classifications are on file with the Interstate Commerce Commission and the various State commissions. It conducts the express business throughout the entire country. Pursuant to the laws of the States of Indiana, California, and Virginia which require that certain operations be conducted by domestic corporations, Railway Express Agency organized a wholly-owned subsidiary in each of those States in order to carry on the express business or parts thereof therein.

I have read and studied the order of the Commission dated January 9, 1948, instituting the investigation in this proceeding and the proposed rules attached thereto. To a certain extent the order and proposed rules may affect the operations of Railway Express Agency, Incorporated, in regard to three classes of operations:

(1) Operations pursuant to arrangements under which the Express Agency furnishes motor vehicles and drivers to railroads holding operating authority from the Inter-

state Commerce Commission for the transportation of less-carload freight in substituted motor service.
[fol. 2818] (2) Operations pursuant to arrangements under which express traffic is transported by Star Route Mail Carriers who furnish the motor vehicle and drive the same.

(3) Operations conducted under arrangements between the parent Delaware company and its wholly-owned subsidiaries, Railway Express Motor Transport, Incorporated, in the State of Indiana; Railway Express Agency, Incorporated, of California, in the State of California, and Railway Express Agency, Incorporated, of Virginia, in the State of Virginia.

With regard to the first class of operations, in a number of instances Railway Express Agency furnishes motor vehicle equipment and drivers to railroads holding operating authority for the transportation of l.c.l. freight in substituted motor service. A representative of the Illinois Central Railroad has previously testified in this proceeding at St. Louis, Mo., as to the arrangement between that railroad and this company, and our superintendent, J. C. Legg, has also testified as to the manner in which the service is performed. Mr. George H. Uhl of the Louisville & Nashville Railroad also testified to a similar operation. In addition, Mr. J. N. Needham of the Atlantic Coast Line Railroad testified at the further hearing at Washington, D. C., as to the operations performed under the arrangement between that railroad and this company. The representatives of those railroads have testified in some detail [fol. 2819] as to the arrangements under which the services are performed. Railway Express Agency is in accord with the views expressed by those witnesses as to the possible effect of the proposed rules upon the arrangements involved.

In addition to the operations already explained by the representatives of railroads to which I have just referred, somewhat similar arrangements are in effect with other railroads in various parts of the country. For example, the Seaboard Airline Railway, The Chicago & Northwestern Railway, The Chicago and Eastern Illinois Railroad,

and others. It is this company's desire that the present arrangements be permitted to remain in effect.

In general, the motor vehicle operations are conducted with equipment owned by Railway Express Agency and leased to the railroad. The Express Agency furnishes the drivers, as well as the vehicles. The contract is usually terminable on a 30-to-90-day basis. Compensation is usually on a cost plus basis, including interest on investment. The leased vehicles bear the name of the railroad, and under the arrangement with the railroad the vehicles and the operation thereof must conform to the safety regulations of the Commission and other regulatory bodies. The drivers are trained, experienced, and competent and are fully qualified in all respects under governmental rules and regulations. The agreements provide that the railroad may for good and sufficient cause require that any driver be displaced. [fol. 2820] The Express Agency inspects and makes certain that the vehicles conform to all safety regulations. During the term of the lease the leased vehicles and drivers are under the control and supervision of the railroad, and the vehicles are used exclusively by the railroad in the performance of the motor truck operations under its certificate. The shipments handled in such vehicles move on railroad bills of lading and at railroad rates. All shipping arrangements are between the railroad and the shipping public.

On some of these operations express traffic moving under the Express Agency's tariffs and classifications, and through express receipts, are handled on the vehicles in addition to the shipments moving on railroad bills of lading. These operations have been so conducted for a number of years and have proven to be the most economical and efficient method of handling the express traffic involved. It is in the public interest that this practice be permitted to continue, and Railway Express Agency accordingly requests the favorable consideration of the Commission in respect thereto.

With regard to the second class of operations affected by this proceeding, that is, the operations of Star Route Mail Carriers for the handling of express traffic, Director W. I. Blanning has already referred to those operations

in his testimony on pages 10 to 12, Exhibit 1. He refers therein to the decision of the Interstate Commerce Com- [fol. 2821.] mission in Railway Express Agency, Incorporated, Extension,—Waggoner, Ill., 44 M.C.C. 771, in which the Commission found that under the provisions of the proposed owner-operator agreement the Agency would have complete direction and control of the vehicles, and that under such proposed plan of operation the Agency would be a common carrier by motor vehicle. In that case the Commission specifically approved the proposed mode of operation, and the Express Agency requests that the decision of the Commission in that case be incorporated in this record by reference. Mr. Blanning further stated on page 11 of his Exhibit 1 that substantially similar arrangements have been approved in Railway Express Agency, Incorporated, Extension—Bloomington, Ill., 44 M.C.C. 235, and Railway Express Agency, Incorporated, Extension—Cloquet, Minn., 46 M.C.C. 295, and the Express Agency requests that those decisions of the Commission be also incorporated in this record by reference.

In addition to these cases the Express Agency has about 50 or 60 operations conducted under substantially similar arrangements.

Rule 2(k) of the proposed rules attached to the order of January 9, 1948, instituting this investigation would exempt from the provisions of paragraphs a, c, d, and h of Rule 2, operation of equipment by any carrier in accordance with a plan heretofore submitted in a formal proceeding and specifically approved by the Commission. In his [fol. 2822] testimony Director Blanning stated that Rule 2k was proposed with the operations of Star Route Mail Carriers for the Express Agency in mind, and it is the desire of this company that such operations, having been specifically approved by the Commission, they be permitted to continue as at present. This company, therefore, supports Rule 2k and is of the opinion that the Star Route operations described hereinbefore be permitted to continue so that the public in outlying districts may continue to receive express service in instances where, but for this arrangement, Express Agency might not be able to continue to serve them.

With regard to the third class of operations which might be affected by this proceeding, that is the handling of express traffic by the Express Agency's wholly-owned subsidiaries in the States of Indiana, California, and Virginia; those companies were organized to comply with the respective State laws requiring that certain intrastate operations conducted in the respective States be only by domestic corporations. Each of those subsidiaries is merely an arm of the parent company and their operations enable the performance of express service to and from points on the routes in those States, and as to which train service was curtailed or entirely eliminated. In each instance the capital stock of the subsidiary is owned by the Express Agency, and under the respective arrangements between the parent company and the subsidiary the parent company leases the equipment to the subsidiary. In each in-[fol. 2823] stance the operation is for the handling of regular express traffic in lieu of discontinued or curtailed rail service. In addition, the subsidiary companies transport certain traffic such as milk and cream for some rail lines which moves under railroad billing; also U. S. mail. In each case the subsidiary was created by the Agency to perform operations which it could not itself conduct under the State law. The express traffic transported by the subsidiaries moves in interstate or foreign commerce under the parent company's express rates, tariffs, and classifications. The subsidiary has no dealings with the public, and all of the interstate traffic moves under the billing of the parent company. The I.C.C. certificates held by the subsidiary companies contain conditions which limit the service to be performed to that which is auxiliary to or supplementary of express service and which restrict the shipments to be transported by them to those having an immediately prior or immediately subsequent movement by rail, substituted motor-for-rail, or air. In each case the subsidiary handles intrastate express traffic in addition to interstate traffic. As to intrastate traffic handled locally on the routes of the Indiana subsidiary, the billing is that of the subsidiary. Also, the Indiana subsidiary has authority for and performs an operation between Elkhart, Ind., and Waukesha, Wis., for the transportation of freight moving

under bills of lading and freight rates, tariffs, and classifications filed by the Indiana subsidiary under Part II of the Act.

[fol. 2824] My study of the proposed rules indicates that the arrangements between the parent and subsidiary companies which I have just described will be affected in a number of ways by the proposed rules. The elimination of all leasing arrangements would prevent the arrangements between the parent and subsidiary companies which I have just described and would, of course, also prevent the first two classes of operations which I have previously referred to in my testimony. Likewise, the limiting of leasing to a fixed percentage of vehicles of the using carrier would also be detrimental as the subsidiaries and the railroads to which vehicles are furnished for the transportation of l.c.l. freight do not now own any vehicles and under the particular circumstances no useful purpose would seem to be served by requiring them to do so.

Rule 2a(3) would require the exclusive use of equipment during the full period of the lease and would not permit the use of equipment for the transportation of property of the lawful owner of the equipment or property which is in his custody or control, as agent of shippers. Under the present arrangements between the parent company and the subsidiaries, in some instances the vehicles leased by the parent company to the subsidiary company are utilized, when not in use by the subsidiary, for the pick-up and delivery or local service of the parent company. At some times it is necessary for the parent company to furnish relief or emergency vehicles not regularly assigned to the [fol. 2825] subsidiary. In addition, the Indiana subsidiary transports the intrastate traffic moving under its own billing in addition to the interstate express traffic moving under and through express receipts of the parent company. If the proposed rule is interpreted to prevent such method of handling traffic and use of vehicles it would be objectionable to the Express Agency. In each case the use of the vehicle and the handling of the traffic is the most economical and efficient procedure and is an internal business arrangement. If this use of vehicles and the combined handling of traffic described were prevented by the

proposed rule it would require duplicate operations involving considerable extra expense without added benefit to the public. What I have said with regard to the subsidiary companies handling business under their billing and that of the parent company applies also to the transportation on vehicles leased to the railroads, some of which business is on the billing of the railroads and in some cases on the billing of the express company.

Rule 2b would require receipts at the time of taking and surrendering of possession of the vehicle. This would necessitate the keeping of unnecessary records and bookkeeping, with regard to both the operations for l.c.l. for the railroads and the transportation performed by the subsidiary companies for the parent company. In each instance there is no need for protection of the parties in- [fol. 2826] volved and the public is not involved under the present procedure and under which receipts are not required.

Rule 2c requires that compensation for use of the equipment shall be computed on a "use" basis. The arrangements between the parent company and its subsidiaries, as well as between the Express Agency and the railroads, are on a cost-plus basis, which we understand may properly be considered as on a "use" basis; it is not based on revenue earned by the equipment.

Rule 2d provides that the authorized carrier, before taking possession of the equipment, require a responsible and competent regular employee of it to inspect the equipment. As the parent company fully inspects the equipment to insure that it complies with the motor carrier safety regulations before the equipment is utilized it would not seem necessary for the subsidiary to be required to duplicate that procedure. As the subsidiary is merely an arm of the parent company the double inspection would be clearly an unnecessary duplication.

Rule 2f which requires the authorized carrier to prepare and preserve for two years a truck or load manifest containing certain information which would be impracticable and unnecessary insofar as the arrangements between the parent company and its subsidiaries are concerned. The express traffic transported on the trucks of a subsidiary

consist of a large number of relatively small packages. At the present time a manifest is not required or utilized and it would serve no useful purpose as between the parent and [fol. 2827] subsidiary companies. A record known as a delivery sheet is affixed to each express shipment and accompanies it to destination; it is not detached from the shipment until arrival at destination. The general character of the express traffic is such that it would be impossible to make any record of the commodities or class of merchandise transported. In some instances the express shipments are not weighted until they arrive at destination, thereby making impossible compliance with that part of the proposed rule which would require the showing in the manifest the weight of the commodity transported. This rule was undoubtedly proposed with regard to the handling of truckload shipments and was not intended to apply to, nor could it practically be made applicable to, the handling of a large number of diversified express shipments such as are handled by the Express Agency and its subsidiaries. What has been said concerning the preparation of manifests in connection with the traffic handled by the subsidiaries applies equally to the handling of l.c.l. freight traffic for the railroads.

Rule 2b would require that the person assigned to drive the equipment be an employee of the carrier. Although the drivers of the equipment operated by the subsidiaries are usually employees of the subsidiary, in some instances the drivers are employees of the parent company instead of the subsidiary due to local operating conditions and affiliations with labor organizations. If it were required in [fol. 2828] all cases that the driver be an employee of the subsidiary it is expected strong opposition would be met from the unions. The drivers who are employees of the parent company are usually members of the Brotherhood of Railway Clerks, whereas drivers who are employees of the subsidiaries are, in some instances, members of the International Brotherhood of Teamsters. If the work were to be performed by employees of the subsidiary company rather than the parent company in all cases, the drivers of the parent company would in some instances be required to become members of another union, or be deprived of the work involved which they have performed over a period of

many years as an integral part of the parent company's rail transportation service. Likewise, a driver of the parent company who was required to become an employee of the subsidiary company would lose the benefits of the Railroad Retirement Act under which he is governed when working for the parent company and as an employee of the subsidiary would become subject to the Social Security Act, which is in some respects less favorable to him. Changes in the agreements with the unions can be made only in compliance with the provisions of the Railway Labor Act which became effective in 1926, and the existing agreements were in effect prior to that time. Change of employment from one company to another would also create a loss of seniority to some employees. Under this proposed rule similar disadvantages would arise in connection with the l.c.l. freight operations.

[fol. 2829] Rule 2j would require the authorized carrier either the subsidiary company or the railroad company to furnish the driver of the equipment a true and certified copy of the agreement under which the equipment is used, and would also require that the contract be carried in his possession while driving the rented equipment during the full period of the arrangement. This proposed rule would be objectionable for the reason that it would serve no useful purpose and would be an added burden without justification. It would seem that if any credentials or identification is desired for the driver and equipment it could be provided in a more simple way through the use of a card certificate which could remain attached to the vehicle throughout the period of the leasing arrangement.

Under rule 2k the provisions of paragraphs a, c, d, and h of rule 2 would not apply to the operation of equipment of any carrier in accordance with a plan heretofore submitted by such carrier in a formal proceeding and specifically approved by the Commission. Generally, in applying for the necessary federal operating authority to conduct the particular operations involved, the respective subsidiaries have described the arrangements under which the operations were to be conducted, in the light of which the Commission granted authority to inaugurate the service. Under the circumstances it would seem that the arrange-

ments under which the operations of the subsidiary are being conducted have been approved and that the operation [fol. 2830] of the equipment thereunder should be exempted from paragraphs a, c, d, and h of rule 2.

In conclusion, the Commission has already had before it for consideration the plan under which express traffic is handled by Star Route Mail carriers and has specifically approved the arrangement. As I have previously indicated, it is advisable from the standpoint of the public the Star Route Carrier and the Express Agency that the arrangements be permitted to continue, the circumstances involved being explained fully in the decision of the Commission in 44 M.C.C. 771, which I have already requested be incorporated in the record. Under the proposed rules, obviously, the paragraphs a, c, d, and h of Rule 2 would not apply to the operations of the Star Route Carriers. The Express Agency believes the exemption should be broader and that the provisions of rule 2b, f, and j also should not apply to the Star Route operations, for the reasons heretofore mentioned in connection with those rules.

With regard to the operations of the Express Agency for the handling of l.c.l. freight under arrangements with the railroads and the arrangements between the parent company and the subsidiaries, the proposals would seem not to be directed to the operations of that nature. It appears that in those cases the service to the public is not interfered with in any manner under the present agreements, and that such operations are of a type different from those undertaken to be dealt with in this proceeding. [fol. 2831] The l.c.l. freight operations are conducted merely in substitution of rail service and the operations of the subsidiaries are an integral part of the parent company's operations. The proposed rules to which I have made specific reference are impracticable for application to both classes of operations and would operate to the detriment of the service to the public. As they involve primarily internal arrangements in the performance of the express transportation business by the Express Agency and in the performance of transportation service by the railroads, relief from the application of the proposed rules

to such arrangements would seem not to defeat the purposes of the Commission in this proceeding.

Exam. Lawton: Do you desire to cross-examine the witness?

Mr. Lordan: Will Mr. Gross be present at some subsequent time in the proceeding before which copies of his statement will be distributed which may be read by various counsel before they determine if it is necessary to ask Mr. Gross any questions?

Mr. Marx: It is not so contemplated because Mr. Gross is due in New York City tomorrow, and has to be in Chicago Thursday. That is why we asked he be heard at this time. I have a copy of his testimony if you would like to see it. I would be glad to show it to you.

Exam. Lawton: Will he be available later for cross-examination?

[fol: 2832] Mr. Marx: If that is necessary, yes. Mr. Gross is from Chicago and unless it is absolutely necessary we would like to avoid that.

Exam. Lawton: I take it no one is prepared to cross-examine him at this time. Will he be here the rest of the afternoon?

Mr. Marx: Yes, he will, until 4 o'clock. Will that be late enough?

Exam. Lawton: I should think so. We ought to know by that time. He can be excused until then.

Exam. Lawton: Off the record.

(Discussion off the record.)

Exam. Lawton: Call Mr. Sutherland for cross-examination. This witness has been previously sworn.

D. L. SUTHERLAND was recalled and testified as follows:

Direct Examination.

The Witness: Mr. Examiner, might I have your indulgence to make a short statement, please?

I am testifying, of course, as a representative of the industry that has given me a job to do. This morning I was in the room and heard some remarks about my personal operations, and I merely want to say that while I am on the

stand today for the industry I want to stick to the industry's position.

I will willingly submit myself for cross-examination later on as to my personal ideas or operations or anything any-
[fol. 2833] one wants to know.

Exam. Lawton: You are being examined now on your direct testimony and the exhibit that you introduced.

Mr. Idol: We have completed our direct.

Cross-Examination.

By Mr. Ellis:

Q. Mr. Sutherland, I have just a few questions. I believe you testified on your direct examination in the proceedings held here during the month of October past.

A. That is right, sir.

Q. Subsequent to that time, last week, I believe in fact, there were some sessions of this hearing held in St. Louis, Mo. Were you present at any or all of those hearings?

A. None of them; no, sir.

Q. I would like to state, then, something to you, something preliminary to my questions so you will know what I am talking about.

I was there at St. Louis at that time and there was called by Mr. Todd as a witness one C. J. Williams of Milwaukee, Wis., who identified himself as president of the Contract Carriers of the American Trucking Association, as a vice-president with some degree, third or fourth, of the A.T.A., and also, as I view, as a disgruntled member of the Leasing Committee. Do you know the gentleman?

A. Yes, I do.

Q. The reason I ask whether or not you know him is be-
[fol. 2834] cause he had a lack of familiarity with the names of the members of the committee. I wondered if he knew the chairman.

A. Yes, sir; he does.

Q. He was unable to name any members of the committee. The railroads, or certain of them, through their counsel, put in evidence in this proceeding, as Exhibit 30, a so-called minority report which said Williams made to the

report of the Leasing Committee. Do you know that, Mr. Sutherland?

A. I know he prepared such a thing. I didn't know it was in the record.

Q. The railroads put it in this case.

With that preliminary explanation I would like to ask a few questions: Mr. Williams, in his testimony, was quite critical of the work of the committee, and, among other things, testified he had been informed by Mr. Boot, who, I believe, is the counsel sitting at the other end of the table, that your committee had received reports in answer to a questionnaire, from less than 200 persons, or motor carriers, or whatever they were.

On cross-examination I called attention to the fact that you had stated at the October session that you had had replies from some 4,000 or 5,000. I would like to ask you now if you have had an opportunity to ascertain who is correct. Was it less than 200 or 4,000 or 5,000 motor carriers that replied to your questionnaire?

[fol. 2835] Exam. Lawton: Off the record.

(Discussion off the record.)

By Mr. Ellis:

Q. According to my understanding, the witness attempted to leave the impression originally that there had been less than 200 motor carriers who replied but, on cross-examination, he conceded that maybe some of these replies might have covered more than one person, such as an Association replying.

With that background, all I want to know is, were you right, or substantially correct, when you said you had heard in reply to this questionnaire from some 4,000 or 5,000 members of the motor carrier industry?

A. I was correct in that statement. Mr. Williams was in error.

Q. I want to ask you who appointed this committee, of which you are chairman?

A. The president of the American Trucking Association, Mr. Ed. Buhner.

Q. Did you have anything to do with packing that committee, if I can adopt what I understood his testimony to indicate, with persons who were favorable to any matter in controversy before this Commission in this hearing?

A. I had nothing to do with picking or packing anybody on that committee, and I did not even want the job myself. I acted as chairman afterwards, that is all.

[fol. 2836] Q. I want to call your attention to the last meeting of the committee when your report was adopted. Was this man Williams present at the time?

A. The final report or the American Trucking Association's—

Q. When your committee finally adopted the report which is in evidence.

A. He was not present.

Q. About the time of the hearings in October, the American Trucking Association was having it annual national convention in the City of Washington; is that correct?

A. That is correct, sir.

Q. Was the report of this committee submitted to the Association?

A. Oh, yes.

Q. What action, if any, did the Association take on the report of the committee, if you know?

A. Each of the conferences took their independent discussion of it, brought it back to the executive committee, the executive committee sent it to the floor of the convention with a recommendation for adoption, and it was discussed on the floor of the convention and brought to a vote, and voted unanimously by the convention delegates, some 500-odd in number.

Q. Representing the industry from coast to coast?

A. Selected delegates from 53 separate associations.

Q. I believe you said you knew Mr. Williams.

[fol. 2837] A. I do, sir.

Q. Did you observe him in the City of Washington and in the American Trucking Association convention last September?

A. Oh, yes.

Q. Did he vote against, speak against, or take any action against these reports of your executive committee?

A. He moved in the executive committee that the report of the committee be adopted by the American Trucking Association with the amendment that the Contract Division felt the minimum term of the trip lease should be confined to a roundtrip and not a destination only. That was his instruction that came from the conference of the contract carriers, that they felt there was no place in the industry, or it was not good for the industry, for the trip lease to be in existence for less than a roundtrip lease basis, largely for economic reasons. He moved the adoption of the report in the executive committee with that one amendment, and it was so amended.

After it came from the policy committee, on the floor of the convention he moved the adoption of that report, and that the contract division be allowed to present their views on that particular question or otherwise adopt the report. When he moved that on the floor of the convention I had the honor of seconding it, and it was unanimously passed by the convention delegates.

Q. Since the October hearing, and since you have been advised—

[fol. 2838] Mr. Idol: Mr. Ellis, may I intervene for a moment? I think your recollection is slightly at fault as to what the amendment was on the floor of the convention, Mr. Sutherland. You spoke of the amendment as being an amendment for a roundtrip.

The Witness: You are right. The amendment before the executive committee was confined to the contract carrier conference. On the floor of the convention the amendment was that any conference or division of the industry who did not agree in whole might make presentation, and that is the one that I seconded on the floor of the convention and it was passed.

By Mr. Ellis:

Q. Mr. Sutherland, since your testimony in October and since you have been advised the best I could from my recollection as to what occurred in St. Louis, in view of what Mr. Williams said there, are you now stating that you

should change in any way your pronouncements relative to the work and purpose and recommendations of the committee which you made at the October sessions?

A. No, I am not.

Mr. Ellis: That is all. Thank you.

By Mr. Eldred:

Q. Mr. Sutherland, how many of your questionnaires which were designated as Exhibit 8 were distributed and sent out?

A. I don't recall. I put the figures in when they were fresh in my mind. I don't think I did put them in. I think an A.T.A. witness put them in, but they are in the record. [fol. 2839] Q. Do you know how many of your questionnaires were returned when you had prepared your final report?

A. Whatever the number is, that is in the record. I don't know at this time. I cannot tell you.

Q. Is the number which you indicated to Mr. Ellis the number that was received prior to the time that your report was prepared or were some of them received subsequent to the time your report was prepared?

A. Are we confining ourselves to the questionnaire now?

Q. I am referring particularly to this questionnaire.

A. Some may have been received afterwards. I doubt it because that was sent a complete year before our meeting. That is the first information that went out, and when I say our replies came from 4,000 or 5,000 carriers I am including not only that questionnaire but the two interim reports we sent out and the public hearings that were held all over the country. We got expressions from 4,000 to 5,000 on all different methods.

Q. Did you make any individual compilation as to those who were opposed to trip leasing and those who favored it?

A. Yes.

Q. Could you give us those figures?

A. Somewhere between 18 and 20 percent were opposed to trip leasing. I said, I think, in my original testimony, that one of the things that bothered us considerably was that in trying to arrive at a sufficient weighting of the in- [fol. 2840] formation that came to us, because it was quite

natural and understood by our committee that people who did not engage at all in leasing practices did not bother to express themselves.

Again my point comes back to the committee's action and the committee report, as such, that it is of really no importance at this time. The industry has spoken through its convention delegates, not through its committee.

Q. You stated that there were 500 delegates present.

A. Approximately that. That many are on the board of directors. I think somebody put that information in.

Q. I think you said there were 500 in the room at the time the vote was taken?

A. That is right.

Q. How many of these were carriers as opposed to persons engaged in other types of business?

A. They would all be carriers. They could not be delegates without being a carrier. They were all carriers.

Q. That would include private carriers?

A. Some were private carriers, sure. They were all carriers.

Q. And it might include carriers who were not subject to regulation by the Commission; isn't that true?

A. There might have been some carriers of exempt commodities there. They are subject to safety regulations, however, the same as private carriers.

Q. How many regional meetings did you have around the country, sir?

[fol. 2841] A. Thirteen or fourteen.

Q. You got reports from those?

A. From all of them.

Q. How many of those were opposed, if you remember, to trip leases?

A. I can only group them in the same group and say all the opposition amounted to 18 to 20 percent.

Q. Several of these meetings were definitely opposed; isn't that correct?

A. Only one that I recall.

Q. Which one was that?

A. Minneapolis.

Q. How about Portland?

A. Portland was about fifty-fifty, as I recall. I might say that at the Minneapolis meeting the carriers were so

interested in the subject that one man turned up, and he was opposed to trip leasing. We held the hearing for two days and only one party came in. I think it is understandable, and I don't want to leave any misunderstanding on it. We had just had a big hearing in Chicago and the Wisconsin and Minnesota carriers had been down to Chicago and given their ideas, and put in a lot of testimony, and when we again set a hearing, in order to get a central place for that meeting we set it in Minneapolis. Mr. Williams presided at that meeting. He couldn't make it the day it was [fol. 2842] set and it was postponed once or twice, and when Mr. Williams finally went there only one person showed up for the hearing although we had heard considerable from Wisconsin and Minnesota people in Chicago.

Q. They were opposed to trip leasing, weren't they?

A. The State associations' positions were well known. They were opposed to trip leasing except, as I understand it, between authorized carriers.

Q. Who prepared the proposed rules? Were they voted on by the convention?

A. Not as the convention assembled. They were voted on in each of the individual conferences and individually voted on in the executive committee, but not on the convention floor.

Q. Who prepared the proposed rules?

A. The legal department of A.T.A. prepared them.

Q. Your committee did not?

A. No, not beyond the final report and, in that report of the committee, where the principles were adopted and the rules were adopted to implement those principles.

Q. But the rules, as such, were never presented to the convention as a whole for adoption?

A. To all of its component parts, but not in formal resolution on the floor.

Q. Did you testify in your direct testimony that these rules were adopted by the several conferences of the A.T.A.?

[fol. 2843] A. I think I did; yes, sir.

Q. If you didn't you meant to?

A. It certainly is a fact, whether I said it before or not. It is a fact.

Q. Did that include the contract carrier group?

A. The contract carrier group came back, as I said, adopting it as a whole except for the provision that the minimum term on a trip lease should be a roundtrip to point of origin. That was the only exception that was voted.

Q. Insofar as your proposed rules are concerned, it would not be necessary for the carrier to own a single piece of equipment, would it?

A. No, it would not.

Q. As I understand, there is no prohibition in the rules against trip leasing.

A. None whatsoever.

Q. Now, in the case of a carrier which utilizes its own vehicles it would be responsible for such items as I am going to enumerate, and you can say "yes" or "no" to them.

First, Social Security taxes.

A. I didn't get you.

Q. I say, in a case of a carrier utilizing its own vehicles, with its own drivers, he would be responsible for social security taxes, would he not?

A. Yes.

[fol. 2844] Q. Workmen's compensation?

A. Yes.

Q. Unemployment compensation?

A. Yes.

Q. Insurance on vehicles?

A. Yes.

Q. Cargo insurance?

A. Yes.

Q. Garagae storage and overhead?

A. That would depend on how he operated. He might not have a garage even if he owned his vehicles.

Q. Then he would be responsible for rental of a garage?

A. Not necessarily. Much of the equipment operated today is operated without any garage facilities, even though it is wholly owned or bought under some purchase contract.

Q. He would at least have to rent some place to store it when it was not in use, wouldn't he; might he park it on the city streets?

A. Sometimes that is done. If he had one truck maybe he would not, or two or three, or five.

Q. Suppose he had ten vehicles.

A. He probably would need a garage.

Q. Gasoline and oil expense?

A. Yes.

Q. Maintenance. If he did not have garage employees of course he would not have any maintenance.

[fol. 2845] A. No.

Q. However, he would be responsible for maintenance of the equipment?

A. Yes, he is responsible for maintenance.

Q. Investment in the equipment?

A. That is another questionable item.

Q. If he owned it, even if he was paying it out on the installment plan, he would still have a certain investment, would he not?

A. He might.

Q. He would have to make a down payment, at least?

A. Let me make myself clear. The word "ownership" is used pretty lightly. Much of the equipment in the for-hire industry is purchased on terms exactly with the idea that no investment is ever built up. The manufacturer furnishes the equipment directly on a plan where the payment for the equipment is exactly equal to the depreciation reserve, and I can show you many purchase contract plans where there is no equity in the equipment. Anyone can do it.

Q. Is that the practice, general practice?

A. Amongst big carriers, it certainly is, yes.

Q. He would be responsible for depreciation on the equipment, even under your theory?

A. Oh, yes, surely.

[fol. 2846] Q. Then, in the majority of cases he would be subject to union restrictions insofar as the jurisdiction of union locals is concerned?

A. If he had a union contract of course he would have to live up to it.

Q. And he would also have to assume the employee expenses at layover points where a trip cannot be concluded in a ten-hour run, wouldn't he?

A. If his contract provided for it he certainly would.

Q. Now, when a carrier enters into a haulage arrangement, hauling agreement, such as contemplated under your

rules, would he be responsible for social security and unemployment taxes?

A. Under the terms of his hauling agreement?

Q. You know what the usual hauling agreement is?

A. I am not familiar with the usual hauling agreement. I have seen dozens and dozens of so-called hauling agreements, and some are leases of chattels, in my opinion, some are—I don't think there is any such thing. One of our suggestions was that they have standard terms as far as minimum requirements are concerned.

Q. Is there any way in the rules that you propose, a provision that the carrier pay social security and unemployment taxes?

A. No.

Q. There is no agreement to provide workmen's compensation?

A. No.

[fol. 2847] Q. In other words, there are numerous expenses which the carrier does not directly become responsible for when he enters into the hauling agreement?

A. Numerous expenses which it is not inconsistent for the parties to contract for either or both to perform, and we would have to be again specific as to what the terms of the hauling agreement are.

Q. Let us take, for instance, your unemployment taxes and social security, where you have a hauling agreement with an individual that owns one piece of equipment, operates one piece of equipment. There would be no reason, would there, for entering into an agreement to pay social security and unemployment taxes?

A. That would depend on the ideas of the two contracting parties. The Supreme Court has held that there are certain contracts in which the contractee may assume those quite legally, and, of course, remove them from the contractor, and in other cases they have held exactly the reverse. It again depends on the terms of the specific contract.

Q. You have had wide experience in this industry, Mr. Sutherland, and I think you are pretty familiar with the practices that are going on. At least you are in competition with all these types of practices, are you not?

A. At lot of them.

Q. Certainly when the carrier enters into these hauling [fol. 2848] agreements it is not with the idea of paying more than it would cost him if he owned and operated his own equipment, is it?

A. No, I think all things considered he feels it is to his advantage to utilize that type rather than some other type of arrangement to secure his equipment. That does not necessarily, however, imply he does it to escape compensation or anything in that whole group, however. I don't know. Again we have to know what is behind the particular transaction and in the minds of the two parties.

Q. In connection with rule 4 which is in regard to the rental of motor vehicles and equipment to or from shippers, as I understand rule 4 a carrier could lease a truck and driver to a shipper, which might be used in performing transportation for the shipper in territory for which the carrier does not hold authority. Is that correct?

A. No, that is not correct.

Q. Well, now, how would the rule prevent that, sir?

A. Simply by—you can't take that particular rule by itself. We have all worked on the assumption and provided that it be made more plain that the law today provides that whenever any person furnishes a vehicle to a shipper and either directly or indirectly furnishes the services of a driver for that piece of equipment, he is engaging in transportation for compensation and must have authority from the Commission to do so. He cannot furnish equipment with drivers to the shippers unless he has a permit allow- [fol. 2849] ing him to engage in that transportation.

Q. There is nothing specifically in rule 4 that would prohibit any such operation, is there?

A. No, it is not in rule 4. Rule 4 provides that he shall either provide for the charges in his tariffs and schedules, or he shall notify the Commission of the circumstances surrounding it so they can look see if it is legitimate. If he holds the proper authority from the Commission to do that job he can put it in his tariffs or in his schedule of rates. If he does not have it in his schedule or tariff and still engages in it for emergency reasons, or otherwise, whatever it may be—if he does it he must notify the Commission immediately of all of the circumstances, and why he has done it.

Q. The carrier has in his tariff a provision that the truck and driver will be furnished at, say, 30 cents a mile. He has a tariff on file. Would you assume under that that he could furnish a truck and driver to a shipper?

A. Oh, yes, if his tariff provides for it. His tariff has to be in pursuance of his operating authority from the Commission. If they had given him the operating authority, and approved that rate, he certainly can engage in it, and he must engage in it to those he has authority to serve, whether he is a contract carrier or a common carrier.

Q. As I understand it, then, the only thing this rule 4 provides is that a letter shall be sent to the Commission [fol. 2850] describing the circumstances. Is that right?

A. I think we might shorten this a little if I tell you this is copied from the rule of Burthen which provides a method by which a railroad can apply a rate on tank cars, and so forth, which are owned by shippers, carrying the shippers' commodity or otherwise. That is my understanding of it.

Q. It seems here that you are providing for leasing—as I see this rule, there is nothing to prevent a carrier leasing equipment to perform service beyond that which he is definitely authorized to perform. The rails publish the tariff, and the concurring carriers who operate on their own tracks and furnish equipment——

A. The carrier must operate under his own authority and under published or approved tariffs or rates and tariffs. A carrier has no right to go beyond his authority.

Q. Then, so we will be clear on this: Rule 4 only applies to carriers which have authority from the Commission to perform the service for which they are leasing the equipment to the shipper. Is that correct?

A. I think you had better start that over. I don't think you meant what you said, if I understood you. I am afraid I didn't. Go ahead.

Q. As I understand, rule 4 is only to apply to carriers which are leasing equipment to shippers to perform service for which they hold authority.

[fol. 2851] A. You are right if you keep out the word "only." It also applies in the reverse direction where a shipper might be leasing a piece of equipment to a carrier. It goes beyond what you said, but it covers what you said.

Q. Insofar as the carrier is concerned, my statement is correct?

A. He cannot perform any service he has no authority for.

Mr. McAuliffe: May I interrupt?

You are speaking of leasing a truck to a shipper. Do I understand that to mean leasing a truck without a driver, as well as leasing a truck with a driver to the shipper?

Mr. Eldred: I will break that down so we will get it clear.

By Mr. Eldred:

Q. Would that apply leasing a truck with a driver?

A. Yes.

Q. Without a driver?

A. Without a driver it does not apply.

Q. So this rule only applies when the truck is accompanied by a driver?

A. Yes.

Q. You have suggested, I believe, in rule 7, that the Commission might designate through certain employees departures from rules and regulations of the Commission which they might establish in this proceeding.

[fol. 2852] A. Yes.

Q. I assume in view of your statement that this has been approved by the legal department—these rules——

A. I think that is a fair inference. We think they are all legal rules; yes, sir.

Mr. Eldred: Mr. Examiner, may I inquire personally of Mr. Sutherland, or do you want to defer that until other matters are gone into?

Exam. Lawton: Mr. Sutherland and his counsel——

The Witness: I have no objections if he asks me now.

Exam. Lawton: Well, we will take a short recess for five minutes.

(Short recess.)

Exam. Lawton: Come to order, please.

Mr. George: Mr. Examiner, may I make a statement at this time, please?

Exam. Lawton: Before we resume cross-examination of Mr. Sutherland, Mr. George has a statement.

Mr. George: I have a witness here, Mr. John Mc. Cochrane, president of Lyons Transportation Company of Erie, Pa., and I would like to have this statement made of record, that in the event he were called his testimony would be merely cumulative of the witness Markowitz this morning.

Exam. Lawton: The statement is noted on the record.

By Mr. Eldred:

Q. In connection with rule 4 we have had some discus- [fol. 2853] sion off the record with Mr. Idol, and I understand—and will you tell me if my understanding is correct—that rule 4 only applies to the leasing of the vehicle from a shipper to a carrier without a driver.

Mr. Idol: Or from a carrier to a shipper.

By Mr. Eldred:

Q. Or from a carrier to a shipper without a driver.

A. May I elaborate a little on that answer? I am told that I misspoke myself a while ago in answer to one question because I was probably thinking of another question. The premise on which we work, and what rule 4 does accomplish, or is intended to accomplish is again, and I repeat, just this: No carrier has a right to furnish a vehicle to a shipper if he furnishes the driver either directly or indirectly without authority to perform that operation from the Commission.

Part of rule 4, therefore, would apply in that case. If he has the authority from the Commission he specifically must have the rates in his tariffs or schedules. If he leases a piece of equipment from a shipper, or to a shipper, without any driver, and there is a question that there might be a rebate, the compensation for that lease being paid by the carrier to the shipper, or vice versa, could constitute a rebate, and rule 4 is designed so the Commission will be put on notice as to all those circumstances and therefore have a look see to determine whether it was a legitimate proposition or a subterfuge to accomplish a rebate.